

California Regulatory Notice Register

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OAL REGULATORY DETERMINATIONS

The California Regulatory Notice Register is an official state publication of the Office of Administrative Law containing notices of proposed regulatory actions by state regulatory agencies to adopt, amend or repeal regulations contained in the California Code of Regulations. The effective period of a notice of proposed regulatory action by a state agency in the California Regulatory Notice Register shall not exceed one year [Government Code § 11346.4(b)]. It is suggested, therefore, that issues of the California Regulatory Notice Register be retained for a minimum of 18 months.

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PROPOSED ACTION ON REGULATIONS

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TITLE 2. DEPARTMENT OF GENERAL SERVICES

NOTICE OF PROPOSED RULEMAKING

The Department of General Services (DGS) proposes to adopt the proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The DGS proposes to amend the California Code of Regulations, title 2, division 2, chapter 3, subchapter 10.5, section 1896.61, subdivision (i) and to adopt subchapter 10.6. Section 1896.61 concerns modifying the name of the Disabled Veteran Business Enterprise (DVBE) certification office. Subchapter 10.6 creates the DVBE incentive program.

PUBLIC HEARING

DGS will hold a public hearing on the proposed amendments:

December 19, 2006

Starting at 10:00 a.m.
Department of General Services
Auditorium, 1st floor
707 3rd Street
West Sacramento

If you have a disability and require assistance to participate in this hearing, please contact Melodie Cato at (916) 375–4935. This location is wheelchair accessible.

At the hearing, any person may present written or oral comments relevant to the proposed action described in the Informative Digest.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the

proposed regulatory action to the DGS. The written comment period closes at 5:00 p.m. on **December 19**, **2006**. The DGS will consider only comments received at the DGS office by that time. Submit comments to:

Office of Small Business and Disabled Veteran Business Enterprise Services,
Attention: Melodie Cato
Procurement Division, DGS
707 3rd Street, 1st floor, Room 400
Sacramento, CA, 95605
E-mail to melodie.cato@dgs.ca.gov.

AUTHORITY AND REFERENCES

Military and Veterans Code section 999.5 subdivision (d) authorized the DGS to adopt the proposed regulations, which would implement, interpret or make specific section 999.5 subdivision (a) of the Military and Veterans Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The DGS proposes to amend section 1896.61, subdivision (i) to make a nonsubtantial change to reflect that the name of the Office of Small and Minority Business has been changed to the Office of Small and Disabled Veteran Business Enterprise Services.

The DGS proposes to adopt subchapter 10.6 to create a Disabled Veteran Business Enterprise (DVBE) incentive program for use by all state agencies when awarding contracts. The purpose of the proposed regulations is to establish an incentive to ensure that departments meet their mandated 3 percent DVBE participation goal set forth in Public Contract Code section 10115, subdivision (c). This is accomplished by requiring departments to provide an incentive to bidders proposing DVBE participation, thereby increasing the likelihood of contract award to a contractor using DVBE. The amount of the incentive is based on whether the department has historically been meeting the 3 percent DVBE participation goal. If they have not, a higher incentive is provided to increase the likelihood of securing DVBE contractors or subcontractors.

Section 1896.99.100 subdivision (c) establishes the minimum amount of participation required to qualify for an incentive and allows that it may be higher if it is likely to assist the departments in meeting the DVBE participation goal.

Section 1896.99.120 establishes that the incentive amount is determined by whether or not the department has been meeting the required DVBE participation goals historically. For departments that have historically complied with the DVBE participation goals, the re-

quired incentive is low. For departments that have not historically complied with DVBE participation goals, the incentive is higher. Departments also have the option to provide for a higher incentive amount if it is likely to assist the departments in meeting the DVBE participation goal.

Section 1896.99.100 subdivision (a) through (f) establish how the incentive will be applied. These requirements are as follows: (1) identification of the required participation amount and the incentive amount in the solicitation, (2) application only to responsive bids from responsible bidders proposing the minimum required participation (3) calculation of the incentive by reducing the bid price by the amount of the incentive times the lowest responsive and responsible bid for low price solicitations, and (4) calculation of the incentive by increasing the bidder's score by the incentive amount which is determined by multiplying the amount of the incentive times the total number of points available in the solicitation document. Section 1896.99.100 subdivision (f) prohibits a nonsmall business from displacing a small business due to the DVBE incentive.

DISCLOSURES REGARDING THE PROPOSED ACTION

The DGS has made the following initial determinations:

- Mandate on local agencies and school districts:
 None
- Cost or savings to any State agency: Total cost to the State for the DVBE incentive is estimated at \$6–8 million in the first fiscal year.
- Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17561: None.
- Other non–discretionary cost or savings imposed upon local agencies: None.
- Cost or savings in federal funding to the State: None.
- Significant Statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: The requirement that DVBEs receive an incentive in the solicitation process will have an adverse economic impact on those businesses that lose contract awards due to application of the incentive. This is an inherent consequence in the underlying legislation which requires the incentive. The proposed regulation will have no effect on California businesses' ability to compete with businesses in other states. However, the proposed regulation could

potentially shift jobs from a nonDVBE to a DVBE, because the intended result of the regulations is to increase the dollar amount of contracts awarded to DVBEs, which necessarily will decrease the dollar amount of contracts awarded to nonDVBEs. This could also lead to an increase in the number of DVBEs and a decrease in the number of nonDVBEs. Using the numbers from fiscal year 2004–05, the total amount of contract dollars that would have been awarded to DVBEs if the 3 percent goal had been met would be about \$186,000,000 or approximately \$80,000,000 more than was actually awarded to DVBEs. It is difficult to say whether an adjustment of this size from nonDVBEs to DVBEs will result in job shifts or the creation and/or elimination of existing businesses within California. It should certainly expand DVBEs. Overall, the proposed regulation should not have a significant adverse economic impact on business. Rather, it should result in the shifting of State funds from one type of business to another. There is also a minor additional cost to nonDVBEs to recruit DVBEs for subcontracting.

- Cost impact on private person or directly affected businesses: Minor impact on individuals and businesses that are or are not chosen for the State business due to the DVBE incentive. The Department is not aware of any other cost.
- Creation or elimination of jobs within California: None or very minor shift due to a DVBE business receiving State work that would have gone to a non-DVBE.
- Creation of new business or eliminate existing businesses within California: A small number of businesses may be created or eliminated based upon winning State contracts.
- Expansion of businesses currently doing business within California: Minimal. DVBEs may decide to locate in California and go after State business using the DVBE incentive
- Significant effect on housing costs: None.

BUSINESS REPORTING REQUIREMENT

The proposed regulations do not have any reporting requirement for businesses.

PLAIN ENGLISH AND SMALL BUSINESS DETERMINATION AND OVERVIEW

Small Business Determination

The proposed regulations minimally affect small business. A minimal number of small businesses that are also DVBEs may receive State business that may have gone to a small business that was not also a DVBE. Advertising for and communicating with DVBEs to partner or subcontract for a State bid might also be a slight economic cost to small business.

Plain English Policy Overview

The proposed regulations provide a DVBE incentive process. The DVBE incentive is only applied for bidders proposing DVBE participation as required for departments awarding contracts. The DVBE incentive percentages are based on the history of the awarding department in meeting its three percent DVBE goal. For awards based on low price, the bid is evaluated by subtracting a computed amount from the bid price. The computed amount is the incentive times the lowest responsive and responsible bidder's price. This subtraction of price is for evaluation purposes only. For awards based on highest score, the bidder's score is increased by the incentive points. The incentive points are determined by multiplying the amount of the incentive times the total number of points available in the solicitation.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the DGS must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the DGS would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The DGS invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

CONTACT PERSON

Inquiries concerning the proposed regulatory action may be directed to:

Melodie Cato, Regulations Contact
Office of Small Business and Disabled Veteran
Business Enterprise Services (OSDS), Procurement
Division
Department of General Services

Department of General Services 707 3rd Street, 1st floor, Room 400 West Sacramento, CA 95605

(916) 375–4935

E-mail: Melodie.Cato@dgs.ca.gov

Backup person for these inquiries is:

Russ Guarna, Purchasing Manager External Operations Branch, Procurement Division Department of General Services 707 3rd Street, 1st floor, Room 400 West Sacramento, CA 95605 (916) 376–1621

E-mail: russ.guarna@dgs.ca.gov

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The DGS will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, the initial statement of reasons, the report titled "Disabled Veteran Business Enterprise Statewide Statistical Annual Report for Fiscal Year 04-05," and the report titled "Disabled Veteran Business Enterprise Program: Few Departments That Award Contracts Have Met the Potentially Unreasonable Participation Goal, and Weak Implementation of the Program Implementation of the Program Further Hampers Success." Copies may be obtained by contacting Melodie Cato at the address, phone number, or email listed above. Copies may be also viewed and downloaded from the DGS Web http://www.pd.dgs.ca.gov/smbus/default.htm

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the DGS may adopt the proposed regulations substantially as described in this notice. If the DGS makes modifications, which are sufficiently related to the originally proposed text, it will make the modified text with the changes clearly indicated available to the public for at least 15 days before the DGS adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Melodie Cato at the address indicated above. The DGS will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Ms. Cato at the address, phone number, or email listed previously in this Notice.

TITLE 2. FAIR POLITICAL PRACTICES COMMISSION

NOTICE IS HEREBY GIVEN that the Fair Political Practices Commission, pursuant to the authority vested in it by Sections 82011, 87303, and 87304 of the Government Code to review proposed conflict of interest codes, will review the proposed/amended conflict of interest codes of the following:

CONFLICT OF INTEREST CODES

ADOPTION

MULTI-COUNTY: California Enterprise Development Authority

A written comment period has been established commencing on October 27, 2006, and closing on December 11, 2006. Written comments should be directed to the Fair Political Practices Commission, Attention Barbara Smith, 428 J Street, Suite 620, Sacramento, California 95814.

At the end of the 45–day comment period, the proposed conflict of interest code(s) will be submitted to the Commission's Executive Director for his review, unless any interested person or his or her duly authorized requests, no later than 15 days prior to the close of the written comment period, a public hearing before the full Commission. If a public hearing is requested, the proposed code(s) will be submitted to the Commission for review.

The Executive Director or the Commission will review the above–referenced conflict of interest code(s), proposed pursuant to Government Code Section 87300, which designate, pursuant to Government Code Section 87302, employees who must disclose certain investments, interests in real property and income.

The Executive Director or the Commission, upon his or its own motion or at the request of any interested person, will approve, or revise and approve, or return the proposed code(s) to the agency for revision and re—submission within 60 days without further notice.

Any interested person may present statements, arguments or comments, in writing to the Executive Director of the Commission, relative to review of the proposed conflict of interest code(s). Any written comments must be received no later than **December 11**, **2006**. If a public hearing is to be held, oral comments may be presented to the Commission at the hearing.

COST TO LOCAL AGENCIES

There shall be no reimbursement for any new or increased costs to local government which may result

from compliance with these codes because these are not new programs mandated on local agencies by the codes since the requirements described herein were mandated by the Political Reform Act of 1974. Therefore, they are not "costs mandated by the state" as defined in Government Code Section 17514.

EFFECT ON HOUSING COSTS AND BUSINESSES

Compliance with the codes has no potential effect on housing costs or on private persons, businesses or small businesses.

AUTHORITY

Government Code Sections 82011, 87303 and 87304 provide that the Fair Political Practices Commission as the code reviewing body for the above conflict of interest codes shall approve codes as submitted, revise the proposed code and approve it as revised, or return the proposed code for revision and re—submission.

REFERENCE

Government Code Sections 87300 and 87306 provide that agencies shall adopt and promulgate conflict of interest codes pursuant to the Political Reform Act and amend their codes when change is necessitated by changed circumstances.

CONTACT

Any inquiries concerning the proposed conflict of interest code(s) should be made to Barbara Smith, Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814, telephone (916) 322–5660.

AVAILABILITY OF PROPOSED CONFLICT OF INTEREST CODES

Copies of the proposed conflict of interest codes may be obtained from the Commission offices or the respective agency. Requests for copies from the Commission should be made to Barbara Smith, Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814, telephone (916) 322–5660.

TITLE 2. FAIR POLITICAL PRACTICES COMMISSION

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CONFLICT OF INTEREST CODES

ADOPTION

MULTI-COUNTY: Dixon Regional Watershed Joint Powers Authority

A written comment period has been established commencing on October 27, 2006, and closing on December 11, 2006. Written comments should be directed to the Fair Political Practices Commission, Attention Kevin S. Moen, PhD, 428 J Street, Suite 620, Sacramento, California 95814.

At the end of the 45–day comment period, the proposed conflict of interest code(s) will be submitted to the Commission's Executive Director for his review, unless any interested person or his or her duly authorized requests, no later than 15 days prior to the close of the written comment period, a public hearing before the full Commission. If a public hearing is requested, the proposed code(s) will be submitted to the Commission for review.

The Executive Director or the Commission will review the above—referenced conflict of interest code(s), proposed pursuant to Government Code Section 87300, which designate, pursuant to Government Code Section 87302, employees who must disclose certain investments, interests in real property and income.

The Executive Director or the Commission, upon his or its own motion or at the request of any interested person, will approve, or revise and approve, or return the proposed code(s) to the agency for revision and re—submission within 60 days without further notice.

Any interested person may present statements, arguments or comments, in writing to the Executive Director of the Commission, relative to review of the proposed conflict of interest code(s). Any written comments must be received no later than December 11, 2006. If a public hearing is to be held, oral comments may be presented to the Commission at the hearing.

COST TO LOCAL AGENCIES

There shall be no reimbursement for any new or increased costs to local government which may result from compliance with these codes because these are not new programs mandated on local agencies by the codes since the requirements described herein were mandated by the Political Reform Act of 1974. Therefore, they are

not "costs mandated by the state" as defined in Government Code Section 17514.

EFFECT ON HOUSING COSTS AND BUSINESSES

Compliance with the codes has no potential effect on housing costs or on private persons, businesses or small businesses.

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TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE

NOTICE IS HEREBY GIVEN that the Department of Food and Agriculture amended Section 3591.13, subsection (a), of the regulations in Title 3 of the California Code of Regulations pertaining to Guava Fruit Fly Eradication Area as an emergency action that was effective on October 6, 2006. The Department pro-

poses to continue the regulation as adopted and to complete the amendment process by submission of a Certificate of Compliance no later than February 2, 2007.

A public hearing is not scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the Department no later than 15 days prior to the close of the written comment period. Following the public hearing if one is requested, or following the written comment period if no public hearing is requested, the Department of Food and Agriculture, at its own motion, or at the instance of any interested person, may adopt the proposal substantially as set forth without further notice.

Notice is also given that any person interested may present statements or arguments in writing relevant to the action proposed to the agency officer named below on or before December 11, 2006.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing law provides that the Secretary is obligated to investigate the existence of any pest that is not generally distributed within this state and determine the probability of its spread, and the feasibility of its control or eradication (FAC Section 5321).

Existing law also provides that the Secretary may establish, maintain, and enforce quarantine, eradication, and other such regulations as he deems necessary to protect the agricultural industry from the introduction and spread of pests (Food and Agricultural Code, Sections 401, 403, 407 and 5322). Existing law also provides that eradication regulations may proclaim any portion of the State as an eradication area and set forth the boundaries, the pest, its hosts, and the methods to be used to eradicate said pest (Food and Agricultural Code Section 5761).

Section 3591.13, subsection (a), was amended and established Alameda County as an eradication area for guava fruit fly, *Bactrocera correcta*. The effect of this action was to establish authority for the State to conduct detection and eradication activities in Alameda County. There is no existing, comparable federal regulation or statute.

COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department of Food and Agriculture has determined that Section 3591.13 does not impose a mandate on local agencies or school districts and no reimbursement is required for Section 3591.19 under Section 17561 of the Government Code. The Department also has determined that no savings or increased costs to any

state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the proposed action.

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed actions will not affect housing costs.

EFFECT ON BUSINESSES

The Department has made an initial determination that the proposed actions will not have a significant statewide adverse economic effect directly affecting California businesses, including the ability of California businesses to compete with businesses in other states.

COST IMPACT ON AFFECTED PRIVATE PERSON OR BUSINESSES

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

ASSESSMENT

The Department has made an assessment that the proposed adoption and amendment to the regulations would <u>not</u> (1) create or eliminate jobs within California, (2) create new business or eliminate existing businesses within California, or (3) affect the expansion of business currently doing business within California.

ALTERNATIVES CONSIDERED

The Department of Food and Agriculture must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the actions are proposed or would be as effective and less burdensome to affected private persons than the proposed actions.

AUTHORITY

The Department proposes to amend Section 3591.13, subsection (a), pursuant to the authority vested by Sections 407 and 5322 of the Food and Agricultural Code.

REFERENCE

The Department proposes to amend Section 3591.13. subsection (a), to implement, interpret and make specific Sections 407, 5322, 5761, 5762 and 5763 of the Food and Agricultural Code.

EFFECT ON SMALL BUSINESS

The proposed amendment of this regulation may affect small businesses.

CONTACT

The agency officer to whom written comments and inquiries about the initial statement of reasons, proposed actions, location of the rulemaking files, and request for a public hearing may be directed to is: Stephen S. Brown, Department of Food and Agriculture, Plant Health and Pest Prevention Services, 1220 N Street Room A–316, Sacramento, California 95814, (916) 654–1017, FAX (916) 654–1018, E–mail sbrown@cdfa.ca.gov. In his absence, you may contact Liz Johnson at (916) 654–1017. Questions regarding the substance of the proposed regulations should be directed to Stephen S. Brown.

INTERNET ACCESS

The Department has posted the information regarding this proposed regulatory action on its Internet website (www.cdfa.ca.gov/cdfa.pendingregs).

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Department of Food and Agriculture has prepared an initial statement of reasons for the proposed actions, has available all the information upon which its proposal is based, and has available the express terms of the proposed action. A copy of the initial statement of reasons and the proposed regulations in underline and strikeout form may be obtained upon request. The location of the information on which the proposal is based may also be obtained upon request. In addition, when completed, the final statement of reasons will be available upon request. Requests should be directed to the contact named herein.

If the regulations amended by the Department differ from, but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of amendment. Any person interested may obtain a copy of said regulations prior to the date of

adoption by contacting the agency officer (contact) named herein.

TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE

NOTICE IS HEREBY GIVEN that the Department of Food and Agriculture amended Section 3423(b) of the regulations in Title 3 of the California Code of Regulations pertaining to Oriental Fruit Fly Interior Quarantine as an emergency action that was effective on September 8, 2006. The Department proposes to continue the regulation as amended and to complete the amendment process by submission of a Certificate of Compliance no later than January 8, 2007.

A public hearing is not scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the Department no later than 15 days prior to the close of the written comment period. Following the public hearing if one is requested, or following the written comment period if no public hearing is requested, the Department of Food and Agriculture may certify that there was compliance with provisions of Section 11346.1 of the Government Code within 120 days of the emergency regulation.

Notice is also given that any person interested may present statements or arguments in writing relevant to the action proposed to the agency officer named below on or before December 11, 2006.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing law obligates the Department of Food and Agriculture to protect the agricultural industry of California and prevent the spread of injurious pests (Food and Agricultural Code Sections 401 and 403). Existing law provides the Secretary may establish, maintain, and enforce quarantine regulations, as he deems necessary, to circumscribe and exterminate or prevent the spread of pests (Food and Agricultural Code, Sections 5301, 5302 and 5322).

The amendment of Section 3423(b) establishes a quarantine area of approximately 65 square miles surrounding the Rialto area of San Bernardino County. The effect of the change is to provide authority for the State to regulate movement of hosts of Oriental fruit fly from, into, and within that area under quarantine to prevent artificial spread of the fly to noninfested areas to protect California's agricultural industry. The proposed action does not differ from any existing, comparable federal regulation or statute.

COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department of Food and Agriculture has determined that Section 3423 does not impose a mandate on local agencies or school districts, except that an agricultural commissioner of a county under quarantine has a duty to enforce Section 3423. No reimbursement is required for Section 3423 under Section 17561 of the Government Code because the San Bernardino County Agricultural Commissioner requested the change in the regulation.

The Department also has determined that the amended regulation will involve no additional costs or savings to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State.

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed action will not affect housing costs.

EFFECT ON BUSINESSES

The Department has made an initial determination that the proposed action will not have a significant, statewide adverse economic impact directly affecting California businesses, including the ability of California businesses to compete with businesses in other states.

COST IMPACT ON REPRESENTATIVE PRIVATE PERSON OR BUSINESS

The cost impact of the amended regulation on a representative private person or business is not expected to be significantly adverse. A representative person or business could incur costs of approximately \$88 per year in reasonable compliance with the proposed action.

ASSESSMENT

The Department has made an assessment that the proposed amendments to the regulations would <u>not</u> (1) create or eliminate jobs within California, (2) create new business or eliminate existing businesses within California, or (3) affect the expansion of businesses currently doing business within California.

ALTERNATIVES CONSIDERED

The Department of Food and Agriculture must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

AUTHORITY

The Department proposes to amend Section 3423(b) pursuant to the authority vested by Sections 407, 5301, 5302 and 5322 of the Food and Agricultural Code.

REFERENCE

The Department proposes this action to implement, interpret and make specific Sections 5301, 5302 and 5322 of the Food and Agricultural Code.

EFFECT ON SMALL BUSINESS

The amendment of this regulation may affect small businesses.

CONTACT

The agency officer to whom written comments and inquiries about the initial statement of reasons, proposed action, location of the rulemaking file, request for a public hearing, and final statement of reasons may be directed is: Stephen S. Brown, Department of Food and Agriculture, Plant Health and Pest Prevention Services, 1220 N Street, Room A–316, Sacramento, California 95814, (916) 654–1017, FAX (916) 654–1018, E–mail: sbrown@cdfa.ca.gov. In his absence, you may contact Liz Johnson at (916) 654–1017. Questions regarding the substance of the proposed regulations should be directed to Stephen S. Brown.

INTERNET ACCESS

The Department has posted the information regarding this proposed regulatory action on its Internet website (www.cdfa.ca.gov/cdfa/pendingregs).

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Department of Food and Agriculture has prepared an initial event of reasons for the proposed action,

has available all the information upon which its proposal is based, and has available the express terms of the proposed action. A copy of the initial statement of reasons and the proposed regulations in underline and strikeout form may be obtained upon request. The location of the information on which the proposal is based may also be obtained upon request. In addition, the final statement of reasons will be available upon request. Requests should be directed to the contact named herein.

If the regulations amended by the Department differ from, but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of amendment. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency officer (contact) named herein.

TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE

NOTICE IS HEREBY GIVEN that the Department of Food and Agriculture amended Section 3591.12, subsection (a), of the regulations in Title 3 of the California Code of Regulations pertaining to Peach Fruit Fly Eradication Area as an emergency action that was effective on September 12, 2006. The Department proposes to continue the regulation as amended and to complete the amendment process by submission of a Certificate of Compliance no later than January 10, 2007.

A public hearing is not scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the Department no later than 15 days prior to the close of the written comment period. Following the public hearing if one is requested, or following the written comment period if no public hearing is requested, the Department of Food and Agriculture, at its own motion, or at the instance of any interested person, may adopt the proposal substantially as set forth without further notice.

Notice is also given that any person interested may present statements or arguments in writing relevant to the action proposed to the agency officer named below on or before December 11, 2006.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing law provides that the Secretary is obligated to investigate the existence of any pest that is not generally distributed within this state and determine the probability of its spread, and the feasibility of its control or eradication (FAC Section 5321).

Existing law also provides that the Secretary may establish, maintain, and enforce quarantine, eradication, and other such regulations as he deems necessary to protect the agricultural industry from the introduction and spread of pests (Food and Agricultural Code, Sections 401, 403, 407 and 5322). Existing law also provides that eradication regulations may proclaim any portion of the State as an eradication area and set forth the boundaries, the pest, its hosts, and the methods to be used to eradicate said pest (Food and Agricultural Code Section 5761).

Section 3591.12, subsection (a), was amended and established Los Angeles County as an eradication area for peach fruit fly, *Bactrocera zonata*. The effect of this action was to establish authority for the State to conduct eradication activities in Los Angeles County. There is no existing, comparable federal regulation or statute.

COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department of Food and Agriculture has determined that Section 3591.12 does not impose a mandate on local agencies or school districts and no reimbursement is required for Section 3591.19 under Section 17561 of the Government Code. The Department also has determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the proposed action.

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed actions will not affect housing costs.

EFFECT ON BUSINESSES

The Department has made an initial determination that the proposed actions will not have a significant statewide adverse economic impact directly affecting California businesses, including the ability of California businesses to compete with businesses in other states.

COST IMPACT ON AFFECTED PRIVATE PERSON OR BUSINESSES

The agency is not aware of any cost impacts that a representative private person or business would neces-

sarily incur in reasonable compliance with the proposed action.

ASSESSMENT

The Department has made an assessment that the proposed adoption and amendment to the regulations would <u>not</u> (1) create or eliminate jobs within California, (2) create new business or eliminate existing businesses within California, or (3) affect the expansion of businesses currently doing business within California.

ALTERNATIVES CONSIDERED

The Department of Food and Agriculture must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the actions are proposed or would be as effective and less burdensome to affected private persons than the proposed actions.

AUTHORITY

The Department proposes to amend Section 3591.12, subsection (a), pursuant to the authority vested by Sections 407 and 5322 of the Food and Agricultural Code.

REFERENCE

The Department proposes to amend Section 3591.12, subsection (a), to implement, interpret and make specific Sections 407, 5322, 5761, 5762 and 5763 of the Food and Agricultural Code.

EFFECT ON SMALL BUSINESS

The proposed amendment of this regulation may affect small businesses.

CONTACT

The agency officer to whom written comments and inquiries about the initial statement of reasons, proposed actions, location of the rulemaking files, and request for a public hearing may be directed to is: Stephen S. Brown, Department of Food and Agriculture, Plant Health and Pest Prevention Services, 1220 N Street, Room A–316, Sacramento, California 95814, (916) 654–1017, FAX (916) 654–1018, E–mail: sbrown@cdfa.ca.gov. In his absence, you may contact Liz Johnson at (916) 654–1017. Questions regarding

the substance of the proposed regulation should be directed to Stephen S. Brown.

INTERNET ACCESS

The Department has posted the information regarding this proposed regulatory action on its Internet website (www.cdfa.ca.gov/cdfa.pendingregs).

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Department of Food and Agriculture has prepared an initial statement of reasons for the proposed actions, has available all the information upon which its proposal is based, and has available the express terms of the proposed action. A copy of the initial statement of reasons and the proposed regulations in underline and strikeout form may be obtained upon request. The location of the information on which the proposal is based may also be obtained upon request. In addition, when completed, the final statement of reasons will be available upon request. Requests should be directed to the contact named herein.

If the regulations amended by the Department differ from, but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of amendment. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency officer (contact) named herein.

TITLE 8. DIVISION OF WORKERS' COMPENSATION

NOTICE OF PROPOSED RULEMAKING

Subject Matter of Regulations: Employee Notices — Workers' Compensation Benefit Notices and Notice of Employee Rights Upon Termination of Medical Provider Network

Title 8, California Code of Regulations, Sections 9767.16, 9810, 9811, 9812, 9813 and 9813.1.

NOTICE IS HEREBY GIVEN that the Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her by Labor Code sections 59, 133, 138.3, 138.4, 139.5, 4061, 4616, 4636, 4637, 4658.5, and 5307.3, proposes to adopt and amend regulations within Article 8, Subchapter 1 of Chapter 4.5 of Title 8, California Code of Regulations, commencing with section 9810, relating to Notices for Injuries Related to Loss of Time or Denial of Claim, and Article 3.5, Subchapter 1 of Chapter 4.5

of Title 8, California Code of Regulations, commencing with section 9767.1, relating to Medical Provider Networks

PROPOSED REGULATORY ACTION

The Department of Industrial Relations, Division of Workers' Compensation (hereinafter "Division"), proposes to adopt a regulation within Article 3.5, Subchapter 1 of Chapter 4.5 of Title 8, California Code of Regulations, commencing with section 9767.1, relating to Medical Provider Networks:

Section 9767.16 Notice of Employee Rights Upon Termination or Cessation of Use of Medical Provider Network.

The Division also proposes to adopt and amend regulations within Article 8, Subchapter 1 of Chapter 4.5 of Title 8, California Code of Regulations, commencing with section 9810, relating to Notices for Injuries Related to Loss of Time or Denial of Claim:

Section 9810 General Provisions; Section 9811 Definitions;

Section 9812 Benefit Payment and Notices;

Section 9813 Vocational Rehabilitation Notices;

and,

Section 9813.1 Supplemental Job Displacement

Benefit and Notice of Modified or

Alternative Work Notices.

PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the subjects noted above, on the following dates:

Date: December 12, 2006

Time: 10:00 a.m. to 5:00 p.m. or conclusion of

business

Place: The Junipero Serra State Building,

Auditorium

320 West 4th Street, Los Angeles

The Junipero Serra State Building and its Auditorium are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other types of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request.

If you will require accommodation to attend the hearing, please contact the State Wide Disability Accommodation Coordinator, Betty Ortiz, at 1–866–681–1459 (toll free), or through the California Relay Service by dialing 711 or 1–800–735–2929

(TTY/English) or 1–800–855–3000 (TTY/Spanish) as soon as possible to request assistance.

In order to ensure unimpeded access for disabled individuals wishing to present comments and facilitate the accurate transcription of public comments, camera usage will be allowed in only one area of the hearing room. To provide everyone a chance to speak, public testimony will be limited to 10 minutes per speaker and should be specific to the proposed regulations. Testimony which would exceed 10 minutes may be submitted in writing.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require that, any persons who make oral comments at the hearings also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Division. The written comment period closes at **5:00 p.m.**, on December 12, **2006.** The Division will consider only comments received by the Division by that time. Equal weight will be accorded to oral comments presented at the hearing and written materials.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Maureen Gray, Regulations Coordinator Division of Workers' Compensation Post Office Box 420603 San Francisco, CA 94142

Written comments may be submitted by facsimile transmission (FAX), addressed to the above–named contact person at (510) 286–0687. Written comments may also be sent electronically (via e–mail) using the following e–mail address: dwcrules@dir.ca.gov

Unless submitted prior to or at the public hearing, Ms. Gray must receive all written comments no later than **5:00 p.m.** on December 12, 2006.

The official record of the rulemaking proceeding will be closed at the conclusion of the public hearing. The Administrative Director will not consider written comments received after the close of the public hearing unless an extension of time in which to receive written comments is announced at the public hearing.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code sections 59, 124, 133, 138.3, 138.4, 139.5, 4061, 4616, 4636, 4637, 4658.5, and 5307.3.

Reference is to Labor Code sections 124, 138.7, 139.5, 3208, 3300, 3351, 3381.5, 3700, 3753, 4061, 4616.2, 4635, 4636, 4644, 4650, 4653, 4654, 4658.1, 4658.5, 4658.6, 4661.5, 4700, 4701, 4702, 4703, 4703.5, 4903, and 5402; Insurance Code sections 11651 and 11652; and, Civil Code sections 2330 and 2332.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

Labor Code section 138.3 requires the administrative director to prescribe reasonable rules and regulations to require employers to serve notice on injured employees that they may be entitled to benefits under Division 4 of the Labor Code. Labor Code section 138.4 requires the administrative director to prescribe reasonable rules and regulations for service on the employee (or employee's dependents, in the case of death), notices dealing with the payment, nonpayment, or delay in payment of temporary disability, permanent disability, and death benefits; notices concerning the provision of vocational rehabilitation services; notices of any change in the amount or type of benefits being provided, the termination of benefits, the rejection of any liability for compensation; and, an accounting of benefits paid.

Labor Code section 4616(a) provides that an insurer or employer may establish or modify a medical provider (hereinafter "MPN") network for the provision of medical treatment to injured employees. Labor Code section 4616(g) provides that the administrative director shall develop regulations that establish procedures for purposes of making modification to an employer's medical provider network.

These proposed regulations implement, interpret, and make specific these sections of the Labor Code as follows:

• Proposed new section 9767.16 will require an employer or insurer planning to terminate or otherwise cease the use of an MPN to give each covered employee written notice, not less than 45 calendar days in advance, of the date on which the use of the MPN will end. The notice to employees will be required to be made available in both English and Spanish.

The proposed regulation will also prescribe the required contents of the notice, including informing covered employees that for injuries occurring on or after the termination or cessation of use of the MPN, they will have the right to either continue treatment with their current physician or select their own physician 30 days after the date they reported their injury, pursuant to Labor Code section 4600.

The proposed regulation will also require the notice to inform covered employees that any injured worker receiving treatment at the time of the effective date of termination or cessation of use of the MPN may be entitled to continuity of care, pursuant to section 9767.10 of these regulations, to continue treatment with their terminated MPN provider. If it is the employer that terminates or otherwise ceases use of the MPN, the regulation will require the employer to advise all covered employees of the insurer's liability for continuing care for ongoing claims, and the potential penalties that may be imposed by the WCAB for unreasonable delay or interruption of that care. If it is the insurer that terminates the MPN, the regulation will require the insurer to advise all covered employees of the insurer's liability for continuing care for ongoing claims, and the potential penalties that may be imposed by the WCAB for unreasonable delay or interruption of that care.

The proposed regulation will also require the notice to provide the name, address and telephone number of the person to contact with questions concerning the termination or cessation of use of the MPN, including any questions about continuity of care arrangements.

The proposed regulation will also require the employer or insurer to inform the Division, not less than 30 calendar days in advance, of the termination or cessation by using the "Notice of Material Modification" form set forth at section 9767.8 of the MPN regulations.

 Section 9810 describes the general provisions governing the correct procedure and format for notice letters used to inform injured workers about their entitlement to workers' compensation benefits.

The proposed amendments to section 9810 will allow benefit notices, excepting those mandatory notices set forth in statute or regulation, to be produced in any format developed by the claims administrator, so long as each benefit notice accurately contains all relevant notice elements

required by either statute or regulation. Benefit notices will be required to identify and provide contact information for the claims administrator, to identify the individual claims adjuster responsible for adjusting the employee's claim, and identify any attachments sent with the notice. The regulations will also require the administrative director to make sample notices that comply with these requirements available on the DWC website.

The proposed amendments will also require a claims administrator to make available to an employee, upon request, copies of medical reports, relevant to any benefit notice issued, which have not already been provided, or which are not required to be provided along with a notice.

The proposed amendments will require a claims administrator to send a represented employee's attorney a copy of any benefit notice pamphlet sent to the represented employee.

The existing regulation requires that copies of all benefit notices sent to injured workers shall be maintained by the claims administrator. The proposed amendments will require that the notice copies be maintained in the claim file, and provide that in lieu of retaining a copy of any attachments to the notice, the claims administrator could identify the attachments by name and revision date on the notice. The proposed amendments will also provide that the required copies could be maintained in paper or electronic form.

The proposed amendments will also require that all benefit notices be made available in both English and Spanish.

The proposed amendments will add a reference citation to Labor Code section 124.

• Section 9811 provides definitions of the term used in the benefit notice regulations.

The proposed amendments to section 9811 will add references to a self-administered joint powers authority, a self-administered legally uninsured, and an administrator for an alternative dispute resolution (ADR) program established under Labor Code section 3201.5 or 3201.7 to the definition of the term "claims administrator."

The proposed amendments will delete the existing definition of the term "Date of knowledge of injury."

The proposed amendments will substantially revise the current mandatory statement of employees' remedies, and require *every* benefit notice, excepting those mandatory notices set

forth in statute or regulation, to include the mandatory statement of employee remedies. An alternative statement of employee remedies will be prescribed for employees subject to an alternative dispute resolution (ADR) program under Labor Code sections 3201.5 or 3201.7.

The proposed amendments will delete a redundant reference to "lost time beyond the date of injury" from the existing definition of "Injury."

The proposed amendments will add a definition of the term "permanent and stationary status" for any permanent disability evaluation performed pursuant to the permanent disability rating schedule adopted on or after January 1, 2005. The term will be defined as the point when a ratable medical report states that the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment.

The proposed amendments will add a reference citation to Labor Code sections 3201.5 and 3201.7.

 Section 9812 prescribes the required timeframes for sending benefit notices and the content for notices dealing with each type of benefit to which an injured worker might be entitled.

The proposed amendments to section 9812 will require a claims administrator, unless it had already done so, to include with various benefit notices a copy of the most recent DWC informative pamphlet concerning temporary disability benefits, permanent disability benefits or the Agreed Medical Evaluator/Qualified Medical Evaluator ("AME/QME") medical evaluation process.

The existing regulations provide that if, after a claims administrator has sent a delay notice to advise an employee that the claims administrator cannot make a decision, the claims administrator is unable to make a decision by the date specified in the delay notice, the claims administrator must send a new delay notice within 5 days after the previously specified determination date.

The proposed amendments will provide that if a claims administrator cannot make a determination on by the date specified in a notice to the injured worker, the claims administrator shall send a subsequent notice to the injured worker, not later than the determination date specified in the previous notice, notifying the injured worker of the new date by which the claims administrator expected the determination to be made.

The proposed amendments will require a claims administrator to include with various notices an explanation of the current AME/QME process for resolving medical disputes. Different specific content will be required depending on whether the employee is represented or unrepresented.

The proposed amendments will require a "Notice of Changed Benefit Rate, Payment Amount or Schedule" to be sent to the employee upon a change in the employee's benefit payment amount.

The proposed amendments will require a permanent disability notice for injuries prior to 1991 where the existence of permanent disability is known, to advise the injured worker of the date on which payments could be expected to begin.

For injuries occurring on or after January 1, 1994, when an injury becomes permanent and stationary, the proposed amendments will require that, together with the last payment of temporary disability or within 14 days of knowledge that the injury is permanent and stationary or has caused permanent disability, the claims administrator shall provide notice of the procedures available to obtain a QME or AME evaluation.

For injuries occurring on or after January 1, 2005, and involving permanent disability, the claims administrator shall, concurrently with any increased or decreased payment, notify the injured worker of any increase or decrease in the amount of the injured worker's permanent disability payments, pursuant to Labor Code section 4658, subdivision (d) resulting from the employer's offer of regular, modified or alternative work and acceptance by the injured worker; or resulting from the employer's failure to offer, the employer's early termination of, or the injured worker's refusal to accept the employer's offer of, regular, modified or alternative work. The information will be required to be given in the appropriate PD payment start notice, PD payment resumption notice or notice of change in rate, payment amount or payment schedule.

The proposed amendments will require that for all claims reported on or after April 19, 2004, if an injured worker is entitled to medical care under Labor Code section 5402(c), the claims administrator shall advise the injured worker to send all bills for such treatment to the claims administrator for consideration of payment unless the injured worker has done so already.

The proposed amendments will require that a copy of any Notice Denying Liability for All Compensation Benefits shall be served on all lien

claimants or all persons or entities who can reasonably be identified by the claims administrator from information in the claims file to be potential lien claimants on account of their having furnished benefits, goods or services for which a lien may be filed under Labor Code sections 4903 through 4906, inclusive.

The proposed amendments will require that for claims reported on or after April 19, 2004, regardless of the date of injury, if a claims administrator sends a notice of delay in its decision whether to accept or deny liability for the claim, the notice shall include an explanation of the employee's rights under Labor Code section 5402(c). (Section 5402(c) provides that within one working day after an employee files a claim form, the employer shall authorize the provision of all treatment, consistent with the applicable treatment guidelines, for the alleged injury and shall continue to provide treatment until the date that liability is rejected.) The notice will be required to advise the injured worker that the employer's liability for medical treatment under section 5402(c) is limited to ten thousand dollars (\$10.000).

The proposed amendments will add a reference citation to Labor Code sections 4062.1, 4658(d) and extend the reference to section 4903(a) to sections 4903 through 4906.

 Section 9813 prescribes the required timeframes for sending notices, and the required content for each notice, for vocational rehabilitation benefits.
 The proposed amendments to section 9813 will state that the section shall not apply to dates of injury on or after January 1, 2004.

The proposed amendments will provide that if a claims administrator cannot make a determination by the date it specified in a notice to the injured worker, the claims administrator shall send a subsequent notice to the injured worker, not later than the determination date specified in the previous notice, notifying the injured worker of the new date by which the claims administrator now expects the determination to be made.

The proposed amendments will eliminate any reference to the RU 101 case initiation document.

The proposed amendments will require that if vocational rehabilitation benefits were being denied on the basis that the employee is not medically eligible, unless a copy has already been provided, the claims administrator shall provide a copy of the DWC informative pamphlet "QME/AME Fact Sheet" to the employee along with the notice of denial.

The proposed amendments will update the references to the 1994 version of the "Help in Returning to Work" informational pamphlet to the current version of the pamphlet set forth in Title 8, California Code of Regulations, section 10133.2.

The proposed amendments will clarify that the vocational rehabilitation notices for injuries occurring in 1994 only apply to dates of injury on or after January 1, 1994 through and until December 31, 2003.

 Proposed new section 9813.1 will prescribe required timeframes for sending notices, and require the use mandatory form notices prescribed by the applicable regulations, for supplemental job displacement benefits and offers of regular, modified or alternative work.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative Director has made the following initial determinations:

- Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None. The requirement to provide notices to injured workers of their entitlement to various workers' compensation benefits is a statutory mandate. The regulations only provide the procedures to be used to provide these notices.
- Adoption of these regulations <u>will not</u>: (1) create or eliminate jobs within the State of California, (2) create new businesses or eliminate existing businesses within the State of California, or (3) affect the expansion of businesses currently doing business in California.
- Effect on Housing Costs: None.
- Cost impacts on representative private persons or business: The proposed regulations will not have a significant adverse economic impact on representative private persons or directly affected businesses. The requirement to provide notices to injured workers of their entitlement to various workers' compensation benefits is a statutory mandate. The regulations only provide the procedures to be used to provide these notices. There will be costs for claims administrators to train their employees on the new notice requirements, and claims administrators that use computerized systems to generate benefit notices will have to adjust their systems to produce the amended and newly required notices.

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulations will not affect small businesses. The businesses that are subject to the proposed regulations are insurers, self–insured employers (who must by regulation have substantial net worth and income) and third party administrators, none of which qualify as "small businesses."

FISCAL IMPACTS

- Costs or savings to state agencies or costs/savings in federal funding to the State: There may be administrative costs to the Division implement the regulation and provide a set of sample benefit notices. These costs will be addressed through the normal budget process.
- Local Mandate: <u>None</u>. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with section 17500) of Division 4 of the Government Code: <u>None</u>. (See "Local Mandate" section above.)
- Other nondiscretionary costs/savings imposed upon local agencies: <u>None</u>. (See "Local Mandate" section above.)

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Administrative Director's attention will be more effective in carrying out the purpose for which the actions are proposed or will be as effective and less burdensome to affected private persons than the proposed actions.

The Administrative Director invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

Pursuant to Government Code section 11346.45, the text of the draft proposed regulations was made available for pre—regulatory public comment by and advisory group of interested stakeholders and the general public through a posting on the Division's Internet message board (the DWC Forums).

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE/INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, the proposed text of the regulations, pre–rulemaking comments, copies of the three informative benefit pamphlets referred to in the proposed regulations ("TD Fact Sheet," "QME/AME Fact Sheet" and "Permanent Disability Fact Sheet"), and the Economic and Fiscal Impact Statement (Form 399). Also included are any studies and documents relied upon in drafting the proposed regulations. As public comments are received during the rulemaking process, they will be added to the rulemaking file.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Division's website at www.dir.ca.gov To access them, click on the "Proposed Regulations — Rulemaking" link and scroll down the list of rulemaking proceedings to find the current "Benefit Notice Regulations" rulemaking.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the headquarters of the Division of Workers' Compensation, 1515 Clay Street, Oakland, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rule-making notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Maureen Gray, Regulations Coordinator Division of Workers' Compensation Post Office Box 420603 San Francisco, CA 94142

Inquiries may be submitted by e-mail to: mgray@dir.ca.gov

The telephone number of the contact person is (510) 286–7100.

BACKUP CONTACT/PERSON CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact person:

James M. Robbins
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the backup contact person is (510)286-7100.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

Upon closure of time for receipt of public comments, the Administrative Director may adopt the proposed rulemaking substantially as described above or may modify it if such modifications are sufficiently related to the original text.

With the exception of technical, grammatical or other non–substantive changes, if the Administrative Director makes any changes to the proposed regulations as a result of the public hearing and public comment received, the full text of such modifications to the proposed rulemaking, with changes clearly indicated, will be made available for public comment 15 days prior to their adoption. Notice of the modified text will be mailed to those persons who submit written or oral comments related to the proposed rulemaking or who request notification of any changes to the proposed rulemaking.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the website: www.dir.ca.gov

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the text of the regulations, will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the proposed amendments to the benefit notice regulations will appear in Title 8, California Code of Regulations, commencing with section 9810 and the proposed Notice of Employee Rights Upon Termination or Cessation of Use of Medical Provider Network will appear at Title 8, California Code of Regulations, 9767.16.

TITLE 8. OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

NOTICE OF PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING OF THE OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD AND NOTICE OF PROPOSED CHANGES TO TITLE 8 OF THE CALIFORNIA CODE OF REGULATIONS

Pursuant to Government Code Section 11346.4 and the provisions of Labor Code Sections 142.1, 142.2, 142.3, 142.4, and 144.6, the Occupational Safety and Health Standards Board of the State of California has set the time and place for a Public Meeting, Public Hearing, and Business Meeting:

PUBLIC MEETING:

On **December 14, 2006,** at 10:00 a.m. in the Auditorium of the State Resources Building 1416 Ninth Street, Sacramento, California 95814.

At the Public Meeting, the Board will make time available to receive comments or proposals from interested persons on any item concerning occupational safety and health.

PUBLIC HEARING:

On **December 14, 2006,** following the Public Meeting in the Auditorium of the State Resources Building 1416 Ninth Street, Sacramento, California 95814.

At the Public Hearing, the Board will consider the public testimony on the proposed changes to occupational safety and health standards in Title 8 of the California Code of Regulations.

BUSINESS MEETING: On December 14, 2006, fol-

lowing the Public Hearing in the Auditorium of the State Resources Building 1416 Ninth Street, Sacramento, California

95814.

At the Business Meeting, the Board will conduct its monthly business.

DISABILITY ACCOMMODATION NOTICE

Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the public hearings/meetings of the Occupational Safety and Health Standards Board should contact the Disability Accommodation Coordinator at (916) 274–5721 or the state–wide Disability Accommodation Coordinator at 1–866–326–1616 (toll free). The state–wide Coordinator can also be reached through the California Relay Service, by dialing 711 or 1–800–735–2929 (TTY) or 1–800–855–3000 (TTY–Spanish).

Accommodations can include modifications of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer–Aided Transcription System or Communication Access Realtime Translation (CART), a sign–language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.

NOTICE OF PROPOSED CHANGES TO TITLE 8 OF THE CALIFORNIA CODE OF REGULATIONS BY THE OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

Notice is hereby given pursuant to Government Code Section 11346.4 and Labor Code Sections 142.1, 142.4 and 144.5, that the Occupational Safety and Health Standards Board pursuant to the authority granted by Labor Code Section 142.3, and to implement Labor Code Section 142.3, will consider the following proposed revisions to Title 8, General Industry Safety Orders of the California Code of Regulations, as indicated below, at its Public Hearing on **December 14, 2006.**

1. <u>TITLE 8</u>: <u>GENERAL INDUSTRY SAFETY</u> ORDERS

Chapter 4, Subchapter 7, Article 59

Section 4324

Dust Collection Systems for Woodworking Machines and Equipment

Descriptions of the proposed changes are as follows:

1. <u>TITLE 8</u>: <u>GENERAL INDUSTRY SAFETY</u> ORDERS

Chapter 4, Subchapter 7, Article 59 Section 4324

Dust Collection Systems for Woodworking Machines and Equipment

INFORMATIVE DIGEST OF PROPOSED ACTION/POLICY STATEMENT OVERVIEW

This rulemaking was initiated in response to a request from the Division of Occupational Safety and Health (Division) dated December 3, 2004, to amend Title 8, General Industry Safety Orders (GISO), Section 4324 regarding dust collectors used in the woodworking industry. The newest edition of the National Fire Protection Association (NFPA) standard 664-2002, Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities has reversed the prohibition on indoor dust collection equipment found in the 1998 and older editions. The 2002 NFPA standard recognizes that small, inexpensive "enclosureless bagtype dust collectors" (EDC) have become commonplace in the past several years. The proper installation and safe use of these EDC's benefits both the woodworking industry and their employees because they can be purchased by small and medium-sized woodworking operations that cannot afford a centralized cyclone or baghouse system. The proposed amendments to Section 4324 would incorporate requirements from NFPA 664-2002.

This proposed rulemaking action contains nonsubstantive, editorial, reformatting of subsections, and grammatical revisions. These nonsubstantive revisions are not all discussed in this Informative Digest. However, these proposed revisions are clearly indicated in the regulatory text in underline and strikeout format. In addition to these nonsubstantive revisions, the following actions are proposed:

Section 4324. Exhaust Systems.

Section 4324 provides requirements for exhaust systems used for the removal of sawdust and chips produced by woodworking machines. The proposal would change the title of the section by replacing "Exhaust" with "Dust Collection." This revision would eliminate confusion between "exhaust" and "dust collection" sys-

tems and provide consistency with the terms used in NFPA 664.

Subsection (a)

New proposed subsection (a) would provide the purpose and scope of the standard and adds a note to inform the reader that additional requirements for all mechanical ventilation systems are contained in Section 5143. Additionally, the proposal would replace the term "exhaust" with "dust collection" and the term "sawdust" with "wood dust." These revisions improve clarity and provide consistency with NFPA 664.

Subsection (b)

The requirements of existing subsection (b) are proposed to be moved to new subsection (e). The proposal would add definitions for "dust collection system," "dust collector," and "enclosureless bag—type dust collector" in revised subsection (b). These terms and definitions are nearly the same as those used in NFPA 664 except that editorial changes have been made to improve clarity. The definition of "enclosureless bag—type dust collector" specifies five conditions for a dust collector to be considered an "enclosureless bag—type dust collector." The definitions clearly identify the components of dust collection systems and types of dust collectors allowed.

Subsection (c)

The requirements of existing subsection (c) are proposed to be moved to new subsection (f). The proposal would add language to revised subsection (c) to specify the acceptable locations for dust collectors. The provisions of subsection (c) are consistent with NFPA 664 and Section 5174(i) which pertains to dust collectors for combustible dusts that present an explosion hazard. The criteria for locating EDC's inside of buildings [(4)(A)–(G)] are substantially the same as those specified in NFPA 664. However, an exception is provided which allows dust collectors with a maximum air-handling capacity of 1500 cubic feet per minute (cfm) to be located within 20 feet of another dust collector, employee work station, or emergency egress route. The effect of these revisions is to allow the use of EDC's inside of buildings under specific conditions which provide employees protection from potential fires or explosions.

Subsection (d)

New proposed subsection (d) would require that ducts and flexible hoses on dust collection systems be constructed of metal or other conductive material. The effect of this provision is to prevent the accumulation of static charges which can ignite combustible dust in the dust collection system.

Subsection (e)

The proposal moves existing subsection (b) to new subsection (e) and adds language to clearly identify that

the subsection addresses guards and collection hoods. The reference to Section 3943 is revised to reference Section 3942, which requires guards shall be constructed of substantial material as listed in Table G–1. That table lists construction materials for guards and specifies the minimum thickness for each type of material. Section 3943 contains no specifications related to the thickness of materials used to construct guards. The effect of this revision is to reference the correct Section of the GISO, which specifies the minimum thickness of materials used to construct guards.

Subsection (f)

The proposal moves existing subsection (c) to new subsection (f) and adds language to clearly identify that the subsection addresses the removal of other refuse.

SPECIFIC TECHNOLOGY OR EQUIPMENT

This proposal will not mandate the use of specific technologies or equipment. The proposal would clarify that EDC's are allowed to be used under specific conditions, which are nearly identical to the National Fire Prevention Association Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities, NFPA 664 — 2002 Edition. Employers are currently using EDC's in compliance with NFPA 664 — 2002 Edition. Existing Section 5174 requires dust collectors for combustible dusts that present an explosion hazard shall be located outdoors or in detached rooms of fire-resistant construction and provided with adequate explosion vents, except that liquid-spray type collectors may be located within buildings. The proposal would clarify that employers are allowed to use EDC's within buildings for collecting wood dust and chips, provided that specific conditions are satisfied, which prevent the dust collector from presenting an explosion hazard.

COST ESTIMATES OF PROPOSED ACTION

Costs or Savings to State Agencies

No costs or savings to state agencies will result as a consequence of the proposed action.

Impact on Housing Costs

The Board has made an initial determination that this proposal will not significantly affect housing costs.

Impact on Businesses

The Board has made an initial determination that this proposal will not result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. Also, see the state-

ment above under the heading "Specific Technology or Equipment"

Cost Impact on Private Persons or Businesses

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Also, see the statement above under the heading "Specific Technology or Equipment."

Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

Costs or Savings to Local Agencies or School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under "Determination of Mandate."

Other Nondiscretionary Costs or Savings Imposed on Local Agencies

This proposal does not impose nondiscretionary costs or savings on local agencies.

DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that the proposed standard does not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because the proposed amendments will not require local agencies or school districts to incur additional costs in complying with the proposal. Furthermore, these proposed amendments do not constitute a "new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

The California Supreme Court has established that a "program" within the meaning of Section 6 of Article XIII B of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

The proposed standard does not require local agencies to carry out the governmental function of providing services to the public. Rather, the standards require local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, the proposed standards do not in any way require local agencies to administer the California Occupational Safety and Health program. (See <u>City of Anaheim v. State of California</u> (1987) 189 Cal.App.3d 1478.)

The proposed standard does not impose unique requirements on local governments. All employers — state, local and private — will be required to comply with the prescribed standard.

EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendments may affect small businesses. However, no economic impact is anticipated. Also, see the statement above under the heading "Specific Technology or Equipment."

ASSESSMENT

The adoption of the proposed amendments to this standard will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

REASONABLE ALTERNATIVES CONSIDERED

Our Board must determine that no reasonable alternative considered by the Board or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the proposed action.

A copy of the proposed changes in STRIKEOUT/UNDERLINE format is available upon request made to the Occupational Safety and Health Standard Board's Office, 2520 Venture Oaks Way, Suite 350, Sacramento, CA 95833, (916) 274–5721. Copies will also be available at the Public Hearing.

An INITIAL STATEMENT OF REASONS containing a statement of the purpose and factual basis for the proposed actions, identification of the technical documents relied upon, and a description of any identified alternatives has been prepared and is available upon request from the Standards Board's Office.

Notice is also given that any interested person may present statements or arguments orally or in writing at the hearing on the proposed changes under consideration. It is requested, but not required, that written comments be submitted so that they are received no later than December 8, 2006. The official record of the rule-making proceedings will be closed at the conclusion of the public hearing and written comments received after 5:00 p.m. on December 14, 2006, will not be considered by the Board unless the Board announces an extension of time in which to submit written comments. Written comments should be mailed to the address provided be-

low or submitted by fax at (916) 274–5743 or e-mailed at <u>oshsb@dir.ca.gov</u>. The Occupational Safety and Health Standards Board may thereafter adopt the above proposal substantially as set forth without further notice.

The Occupational Safety and Health Standards Board's rulemaking file on the proposed actions including all the information upon which the proposals are based are open to public inspection Monday through Friday, from 8:30 a.m. to 4:30 p.m. at the Standards Board's Office, 2520 Venture Oaks Way, Suite 350, Sacramento, CA 95833.

The full text of proposed changes, including any changes or modifications that may be made as a result of the public hearing, shall be available from the Executive Officer 15 days prior to the date on which the Standards Board adopts the proposed changes.

Inquiries concerning either the proposed administrative action or the substance of the proposed changes may be directed to Keith Umemoto, Executive Officer, or Michael Manieri, Principal Safety Engineer, at (916) 274–5721.

You can access the Board's notice and other materials associated with this proposal on the Standards Board's homepage/website address which is http://www.dir.ca.gov/oshsb. Once the Final Statement of Reasons is prepared, it may be obtained by accessing the Board's website or by calling the telephone number listed above.

TITLE 15. BOARD OF PAROLE HEARINGS

(FORMERLY BOARD OF PRISON TERMS)

[Notice published October 27, 2006]

NOTICE OF PROPOSED RULEMAKING RN 06-02

SUBJECT: OAL

OAL File No.: 06–0926–07 E Implementation of Penal Code Section 3000.1 Adoption of California Code of Regulations (CCR), Title 15, Section 2275

Emergency Regulation Approved: October 6, 2006

NOTICE IS HEREBY GIVEN that the Board of Parole Hearings (Board) proposes to adopt Title 15, Division 2, California Code of Regulations (CCR) § 2275 concerning implementation of hearings required under Penal Code section 3000.1, after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

The Board has not scheduled a public hearing on this proposed regulatory action. However, the Board will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulations to the Board. The written comment period on the proposed regulations will commence on OCTOBER 27, 2006, and will close at 5:00 p.m. on DECEMBER 11, 2006. All comments must be submitted in writing (by mail, fax or e-mail) to the Agency Contact Person identified in this Notice by that time in order for the comments to be considered by the Board. Submit comments to:

Teresa A. Arcure, Regulations Coordinator Board of Parole Hearings PO Box 4036 Sacramento, CA 95812–4036

Telephone: (916) 322–9424 Facsimile: (916) 322–3475

E-mail: Teresa. Arcure@cdcr.ca.gov

AUTHORITY AND REFERENCE

This regulation is submitted pursuant to the Board's authority under Government Code § 12838.4 and Penal Code §§ 3052 and 5076.2. This regulation is adopted to implement, interpret, and make specific § 3000.1 of the Penal Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Government Code § 12838.4 vests the Board of Parole Hearings with all the powers, duties, responsibilities, obligations, liabilities, and jurisdiction of the Board of Prison Terms, Narcotic Addict Evaluation Authority, and Youthful Offender Parole Board, which no longer exist.

Penal Code § 3052 vests with the Board the authority to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside of prison when eligible for parole.

Penal Code § 5076.2 authorizes the Board to promulgate, maintain, publish, and make available to the general public a compendium of its rules and regulations.

The intent of the adoption of § 2275 is to implement, interpret and make specific the hearings required under Penal Code § 3000.1(d). Specifically, this regulation implements and makes specific the statute by identifying the composition of the hearing panel.

Penal Code § 3000.1(d) provides special hearings for persons convicted under Penal Code § 1168 of first or second degree murder with a life sentence who are revoked parole. Within 12 months of the revocation, the prisoner must be given a Penal Code § 3000.1 hearing to determine whether they shall be released or retained in custody. The 3000.1 hearing considers the gravity and circumstances of parole violation and current threat to public safety. If the hearing panel decides that more lengthy incarceration is necessary then the person is scheduled annually for a parole consideration hearing until released.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Board has made the following initial determinations:

<u>Local Mandates:</u> The Board has determined that the proposed action imposes no mandate upon local agencies or school districts.

Fiscal Impact Statement

• Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630:

None

Cost or savings to any state agency:

Not Significant

- Other non-discretionary cost or savings imposed on local agencies: None
- Cost or savings in federal funding to the state:

None

<u>Significant Statewide Adverse Economic Impact on</u> <u>Business:</u> The Board has determined that there is no significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with business in other states

Cost Impacts on Representative Private Persons or Businesses: The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Assessment of Effects on Job and/or Business Creation, Elimination Or Expansion: The Board has determined that adoption of this regulation will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing business within

California; or (3) affect the expansion of businesses currently doing business within California.

<u>Effect on Housing Costs:</u> The Board has made an initial determination that the proposed action will have no significant effect on housing costs.

Small Business Determination: The Board has determined that the proposed regulation does not affect small business. This regulation directly affects prisoners, parolees and attorneys, who represent them at the small number of these special hearings. Thus, the impact on businesses is beneficial, but minimal. The impact on consumers is also minimal given that the attorneys are appointed by and paid for by the state in the great majority of instances since most of the prisoners/parolees meet indigency standards.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Board did not rely on any technical, theoretical, or empirical studies in consideration of the proposed action.

ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY

The Board must determine that no reasonable alternative considered would be more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the proposed action. While the Board also considered panels of one or two Deputy Commissioners, it determined that the gravity of the consequences of this hybrid parole revocation hearing were closer to those of a life prisoner parole consideration hearing. Therefore, the Board elected to include two commissioners, one of which shall be a deputy commissioner.

ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The subject of this regulatory action has a direct effect on prisoners and parolees. Any impact on small business would be indirect and likely insignificant. The Board has not identified any alternatives that would lessen any adverse impact on small businesses.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

CONTACT PERSON

Please direct requests for copies of the initial statement of reasons, the proposed text of the regulations, or other information upon which the rulemaking is based to:

Teresa A. Arcure, Regulations Coordinator Board of Parole Hearings PO Box 4036

Sacramento, CA 95812–4036 Telephone: (916) 445–5277 Facsimile: (916) 322–3475

E-mail: Teresa.Arcure@cdcr.ca.gov

In any such inquiries, please identify the action by using the Board's regulation control number RN 06–02.

Note: In the event the contact person is unavailable, inquiries should be directed to the following backup contact person at the same address as noted above: Tracy Leifker (916) 324–9890.

Questions on the substance of the proposed regulatory action may be directed to: Marc Remis, (916) 322–6729.

Website Access: Materials regarding this proposal can be accessed from the Board's website at http://www.cdcr.ca.gov/DivisionsBoards/BOPH/reg_revisions.html

AVAILABILITY OF THE INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this Notice, Form 400 (Notice of Submission of Regulations), the proposed text of the regulation, statement of emergency, Form 399 (Fiscal Impact Statement) and the initial statement of reasons. Copies may be obtained by contacting Teresa Arcure at the address or phone number listed above. Additionally, this notice of proposed action, the initial statement of reasons, and the proposed text of the regulations are available on the Board's website at http://www.cdcr.ca.gov/DivisionsBoards/BOPH/reg_revisions.html

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to

the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the board adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Teresa Arcure at the address indicated above or by visiting the Board's website at http://www.cdcr.ca.gov/Divisions-Boards/BOPH/reg_revisions.html. Further, The Board will accept written comments on the modified regulations for 15 days after the day on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained from the Board contact person or the Board's website at http://www.cdcr.ca.gov/DivisionsBoards/BOPH/reg_revisions.html.

AVAILABILITY OF DOCUMENT ON THE INTERNET

Copies of the Notice of Proposed Action, the proposed text of the regulation, Statement of Emergency, and the Initial Statement of Reasons can be accessed through the Board's website at http://www.cdcr.ca.gov/DivisionsBoards/BOPH/reg_revisions.html.

TITLE 16. BUREAU OF AUTOMOTIVE REPAIR

NOTICE OF PROPOSED REGULATORY ACTION AND PUBLIC HEARING CONCERNING PUBLIC INFORMATION DISCLOSURE POLICY

NOTICE IS HEREBY GIVEN that the Department of Consumer Affairs/Bureau of Automotive Repair (hereinafter "Bureau") is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at hearings to be held at 10:00 a.m. on December 13, 2006, in the Hearing Room of the Contractors State Licensing Board located at 9821 Business Park Drive, Sacramento, CA 95827. Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice, must be received by the Bureau at its office not later than 5:00 p.m. on December 13, 2006, or must be received by the Bureau at the above referenced hearing. Comments sent to persons or addresses other than those specified under

Contact Person, or received after the date and time specified above, regardless of the manner of transmission, will not be considered or included in the record of this proposed regulatory action. The Bureau, upon its own motion or at the instance of any interested party, may thereafter formally adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit oral or written testimony related to this proposal or who have requested notification of any changes to the proposal.

AUTHORITY AND REFERENCE

Pursuant to the authority vested by Section 9882 of the Business and Professions Code and Sections 6253 and 6253.4 of the Government Code; and to implement, interpret or make specific Sections 27, 129, and 9882 of the Business and Professions Code, and Sections 6253, 6253.1 and 6254 of the Government Code; as they apply to the Bureau, the Bureau is proposing to adopt the following changes to Article 1 of Chapter 1 of Division 33 of Title 16 of the California Code of Regulations:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Bureau of Automotive Repair (Bureau) was established within the California Department of Consumer Affairs (DCA) in 1972 with the enactment of the Automotive Repair Act¹. The Bureau was created by Chapter 1578, Statutes 1971 (Senate Bill 51, Beilenson), which mandated a statewide automotive repair consumer protection program. In the furtherance of its mandate, the Bureau administers statewide licensing and enforcement programs.

Through its statewide offices, the Bureau conducts consumer protection services related to the automotive repair and Smog Check programs. Bureau representatives register, license and regulate automotive repair dealers, lamp and brake stations and adjusters, and Smog Check stations and technicians. The Bureau accepts and mediates complaints from the public, investigates violations of the Automotive Repair Act, Smog Check laws, and associated regulations. When appropriate, cases are referred to the Attorney General's office for administrative action, or to law enforcement authorities for civil or criminal prosecution. The Bu-

¹ Business and Professions Code § 9880, et seq.

reau shares the commitment of the DCA to ensuring that consumers are provided information about licensees and registrants in a timely, fair and equitable manner.

The CPRA states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The CPRA provides for maximum public access to information in the government's possession. It also provides that disclosure of information about complaints is not mandatory under the CPRA². However, such information may be subject to public disclosure at the discretion of the agency in possession of that information. The standards for disclosure of consumer complaint information recommended by DCA are consistent with the intent of the CPRA and the Consumer Affairs Act³ (CAA). The CAA establishes one of the DCA's most important consumer protection mandates: "educating and informing the consumer to ensure informed consumer choice in the marketplace." In light of the CPRA and the CAA, DCA and the Bureau believe there is a compelling state interest to disclose information regarding certain consumer complaints as soon as practical to help consumers make informed decisions.

It should also be noted that while the Information Practices Act⁴ (IPA) and Article 1, Section 1 of the California Constitution place limitations on releasing personal information, they do not preclude the release of general information about consumer complaints. It is DCA's and the Bureau's view that disclosing the fact that a consumer complaint exists is consistent with the personal privacy protections at issue in the IPA, as those privacy rights apply to personal identifying information, not to information relating to the conduct of business.

In keeping with the maximum disclosure intent of the CPRA and the CAA, it is the policy of the Bureau to provide registrant and licensee information to consumers consistent with the minimum standards recommended by DCA. In the past, in addition to license status and disciplinary history, the Bureau has disclosed consumer complaint information when the complaint has resulted in the issuance of a NOV to the registrant or licensee. The Bureau has discontinued its use of the NOV as a method of informally notifying a registrant or licensee of minor or technical violations confirmed in the review and processing of consumer complaints. As a result, the Bureau's regulations must be updated to delete the reference to the NOV and the disclosure of consumer complaints with NOVs. Instead, the Bureau intends to follow the recommended standards of DCA as the determining factors in disclosing complaint information.

The Bureau remains committed to ensuring that consumers are provided appropriate information about the status of a registrant or licensee, and any administrative actions taken against that registration or license. Every effort is made to provide such information in a timely, fair and equitable manner. The proposed action is intended to update and establish clear standards for disclosing such information.

Current Regulation

Existing regulation in the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 11, are summarized as follows:

- Section 3303.1 implements DCA's policy regarding the availability of information within the Bureau and, in subsection (a), describes the information the Bureau will provide to the public concerning its licensees, upon request. That information includes disciplinary actions, license status and, unless it is determined that disclosure would be unduly prejudicial to a licensee, complaints.
- Subsections (b), (c) and (d) describe the type of information that the Bureau will provide in each of the three categories — complaints, disciplinary actions and license status — and the conditions under which the information will be provided.
- Subsection (e) provides for notification of the licensee when information is provided to a requestor about that licensee.
- Subsection (f) limits the volume of requests the Bureau will respond to from one requestor to no more that three (3) licenses per week.

Effect of Regulatory Action

The proposed action will make changes to existing regulation in the California Code of Regulations, Title 16, Division 33, Chapter 1, Article 11, as follows:

- Section 3303.1 of Article 1 of Chapter 1 of Division 33 of Title 16 of the California Code of Regulations wi11 be amended as follows:
 - 1. Subsection (a) will be recast as an unnumbered introductory paragraph and will be amended to reflect the establishment of the Bureau's general policy for making information available regarding registrations and licenses issued by the Bureau, administrative actions and complaints. The amendments specify that requests may be made by telephone, in person or in writing, including by facsimile or electronic mail transmission, provide for a response by the Bureau within ten (10) days of receipt of a written request for information, and provide

² Subdivision (f) of § 6254 of the Government Code.

³ Business and Professions Code § 300, et seq.

⁴ Civil Code § 1798, et seq.

that the Bureau shall provide the information in writing.

- 2. The current subsection (a) will be replaced with the provisions of the current subsection (d), with minor modifications that clarify what information will be provided regarding registrations or licenses. The requirement to include the reason for "termination" of a license will be eliminated.
- 3. The current subsection (b) will be renumbered as subsection (c) and will be replaced with revised and expanded provisions from the current subsection (c) that clarify the conditions under which the Bureau will disclose information about administrative actions and the information that will be provided.
- 4. The current subsection (c) will be renumbered as subsection (b) and will be replaced with revised and expanded provisions from the current subsection (a) that clarify the conditions under which the Bureau will disclose information about complaints and the information that will be provided. This amendment will eliminate references to a "waiver of confidentiality" and the issuance of a "Notice of Violation" (NOV).
- 5. The current subsection (d) will be replaced with a definition, for purposes of Section 3303.1, of the term "administrative action."
- 6. The current subsection (e) will be repealed in its entirety.
- 7. The current subsection (f) will be repealed in its entirety.
- 8. Other nonsubstantive editorial, grammatical and conforming changes will also be made throughout Section 3303.1. These changes are necessary for clarification and consistency, and to conform to the amendments described above.

FISCAL IMPACT ESTIMATES

<u>Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:</u>

None.

Nondiscretionary Costs/Savings to Local Agencies:

None.

Local Mandate:

None.

Costs to Any Local Agency or School district for Which
Government code Section 17561 Requires

Reimbursement:

None.

Businesses Impact:

The Bureau has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The following studies/relevant data were relied upon in making the above determination:

The proposed action does not impose any requirement upon or require any action by any business. The proposed action merely re–establishes and modifies the Bureau's existing policy on public access to information about registrants and licensees. This regulation does not require anything of any registrant or licensee. Neither does this regulation affect any non–registrant or –licensee. There is no reporting or recordkeeping requirement mandated, nor are there any performance standards imposed, technologies or equipment specified, nor specific actions or procedures prescribed.

Impact on Jobs/New Businesses:

The Bureau has determined that this regulatory proposal will not have any impact on the creation of jobs or new businesses, or the elimination of jobs or existing businesses, or the expansion of businesses in the State of California.

<u>Cost Impact on Representative Private Person or Business:</u>

The Bureau is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Housing Costs:

None.

Effect on Small Business:

The Bureau has determined that the proposed regulations would not affect small businesses. The proposed action merely re–establishes and modifies the Bureau's existing policy on public access to information about registrants and licensees. This regulation does not require anything of any registrant or licensee, whether it is a small business or not. Neither does this regulation affect any non–registrant or –licensee that might be a small business. There is no reporting or recordkeeping requirement mandated, nor are there any performance standards imposed, technologies or equipment specified, nor specific actions or procedures prescribed.

CONSIDERATION OF ALTERNATIVES

The Bureau must determine that no reasonable alternative to the regulation would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments or ally or in writing relevant to the above determinations at the above—mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION

The Bureau has prepared an initial statement of reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Bureau at 10240 Systems Parkway, Sacramento, California 95827.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file, which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

CONTACT PERSON

Inquiries or comments concerning the proposed administrative action may be addressed to:

James Allen Bureau of Automotive Repair 10240 Systems Parkway Sacramento, CA 95827 Telephone: (916) 255–3460 Fax No.: (916) 255–1369

E-mail: jim_allen@dca.ca.gov

The backup contact person is:

Debbie Romani Bureau of Automotive Repair 10240 Systems Parkway Sacramento, CA 95827 Telephone: (916) 255–3460 Fax No.: (916) 255–1369

E-mail: debbie romani@dca.ca.gov

WEBSITE ACCESS

Materials regarding this proposal can also be found on the Bureau's Web site at www.autorepair.ca.gov.

TITLE 18. STATE BOARD OF EQUALIZATION

NOTICE IS HEREBY GIVEN

The State Board of Equalization (the Board), pursuant to the authority vested in it by section 22971.2 of the Business and Professions Code. proposes to adopt the following regulations and Chapter in Title 18, Division 2:

Chapter 9.5 Cigarette and Tobacco Products Licensing Act of 2003

Article 1: Definitions and Citations

Regulation 45000. Definitions. Regulation 45010. Citations.

Article 2: Licenses — Issuance, Transfer and Denial

Regulation 45020. Denial of License.

Regulation 45030. Issuance of License — Transfer of Business.

Regulation 45040. Determination of Arm's Length

Transaction.

Transaction.

Regulation 45050. Transfers or Sales Between

Related Parties.

Regulation 45060. Evidence of a Non–Arm's Length

Transaction.

Regulation 45070. Request for Information and

Records.

Regulation 45080. Appeal — Denial of License.

Regulation 45090. Non–Arm's Length Transfer—

Sales.

Article 3: Notices of Violation or Warning Notices

Regulation 46000. Issuance and Contents of a Notice

of Violation or Warning Notice.

Regulation 46010. Service of a Notice of Violation or

Warning Notice.

Regulation 46020. Finality.

Article 4: Penalties and Fines

Regulation 46030. Penalties for Licensed or

Unlicensed Retailers.

Regulation 46040. Penalties for Licensed or

Unlicensed Wholesalers and

Distributors.

Regulation 46050. Penalties for Licensed or

Unlicensed Manufacturers and

Importers.

Regulation 46060. Mitigating Circumstances. Regulation 46070. Determination of Fine. Regulation 46080. Collection of Fines.

Article 5: Appeal Procedures

Regulation 46090. Right to Appeal.

Regulation 47000. Appeal — Excise Taxes and Fees

Division.

Regulation 47010. Appeal — Appeals Division. Regulation 47020. Appeal — Board Hearing.

Article 6: Seizure and Forfeiture

Regulation 47030. Seizures and Forfeitures.

A public hearing on the proposed regulatory action will be held in Room 121, 450 N Street, Sacramento, at 1:30 p.m., or as soon thereafter as the matter may be heard, on Tuesday, December 12, 2006. At the hearing, any person interested may present statements or arguments or ally or in writing relevant to the proposed regulatory action. The Board will consider written statements or arguments if received by the time of the public hearing.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

To address the problem of untaxed distributions and illegal sales of cigarettes and tobacco products in California, Assembly Bill 71 [Sec. 21. of stats 2003, Ch. 890 (AB 71)] enacted the Cigarette and Tobacco Products Licensing Act of 2003 (hereafter the Act). The Act imposes licensing and various other requirements on all retailers, wholesalers, and distributors of cigarettes and tobacco products, and all manufacturers and importers of cigarettes.

Any violation of the Act may result in either a criminal or civil citation. The Act authorizes the Board to impose civil penalties (suspensions or revocations of a license and/or fines) for violations of the Act. With few exceptions, the civil penalties provided in the Act are not mandatory and, therefore, the Board has discretion in determining the civil penalties to be imposed.

The Board proposes to adopt new Chapter 9.5, entitled "Cigarette and Tobacco Products Licensing Act

of 2003," in Title 18, Division 2, and comprised of the following regulations, to implement and interpret the administration of the Cigarette and Tobacco Products Licensing Act of 2003 with respect to citations, denials of a license when a citation has been issued, penalties and fines, appeal procedures, and seizures and forfeitures under the Act.

Regulation 45000. Definitions.

This regulation provides additional definitions for terms not defined in the section of the Cigarette and Tobacco Products Licensing Act of 2003 that sets forth definitions, Business and Professions Code section 22971 (Definitions).

Regulation 45010. Citations.

This regulation discusses the contents and service of a civil citation or a criminal citation.

Regulation 45020. Denial of License.

This regulation discusses when a new license should not be issued to an applicant when the current license is suspended or a citation has been issued.

Regulation 45030. Issuance of License Transfer of Business.

This regulation discusses what conditions may allow a license to be issued for a business subject to a criminal or civil citation.

Regulation 45040. Determination of Arm's Length Transaction.

This regulation specifies certain criteria the Board's Excise Taxes and Fees Division may use to determine whether a transfer of a business was pursuant to an arm's length transaction.

Regulation 45050. Transfer or Sales Between Related Parties.

This regulation provides that there is a presumption that a transfer or sale between related parties is not at arm's length.

Regulation 45060. Evidence of a Non–Arm's Length Transaction.

This regulation provides examples of evidence that may indicate a sale or transfer was not an arm's length transfer.

Regulation 45070. Request for Information and Records.

This regulation describes examples of evidence that may be provided to the Board's Excise Taxes and Fees Division to establish that a transfer or sale of a business with a suspended or revoked license, or subject to a civil or criminal citation, is at arm's length.

Regulation 45080. Appeal — Denial of License.

This regulation describes the appeals rights of an applicant if a request for a new license is denied.

Regulation 45090. Non-Arm's Length Transfer — Sales.

This regulation describes that a determination by the Board's Excise Taxes and Fees Division that a transfer or sale of a business was not at arm's length may establish grounds for additional violations of the Act, resulting in the possibility of a citation being issued under Business and Professions Code section 22980.2, subdivision (c).

Regulation 46000. Issuance and Contents of a Notice of Violation or Warning Notice.

This regulation discusses that, upon receipt of a copy of a citation, the Board's Excise Taxes and Fees Division will prepare and mail a Notice of Violation or Warning Notice to the appropriate person.

Regulation 46010. Service of a Notice of Violation or Warning Notice.

This regulation describes that mailing a Notice of Violation or Warning Notice to the cited person's last known address as it appears in the records of the Board will complete delivery of said notice. In lieu of mailing, the Notice of Violation or Warning Notice may be served by personal delivery to the person to be served and shall be deemed complete at the time of such delivery.

Regulation 46020. Finality.

This regulation states that unless a Warning Notice or Notice of Violation is timely appealed, such notice and the penalties listed therein shall become final.

Regulation 46030. Penalties for Licensed or Unlicensed Retailers.

This regulation describes the penalties applicable to licensed or unlicensed retailers for violations of specific sections of the Act. The regulation describes when a Warning Notice for a first offense shall be issued, which first offenses shall result in a license suspension and the length of time of such suspension, and that a second or subsequent offense for any violation of the specific sections listed shall result in both a 30–day suspension or revocation and a fine. The regulation also allows for a reduction in the length of suspension or reduction of a revocation to a 30–day suspension if mitigating circumstances are present.

Regulation 46040. Penalties for Licensed and Unlicensed Wholesalers and Distributors.

This regulation describes the penalties applicable to licensed or unlicensed wholesalers and distributors for violations of specific sections of the Act. The regulation describes when a Warning Notice for a first offense shall be issued, which first offenses shall result in a license suspension and the length of time of such suspension, and that a second or subsequent offense for any violation of the specific sections listed shall result in

both a 30–day suspension or revocation and a fine. The regulation also allows for a reduction in the length of suspension or reduction of a revocation to a 30–day suspension if mitigating circumstances are present.

Regulation 46050. Penalties for Licensed and Unlicensed Manufacturers and Importers.

This regulation describes the penalties applicable to licensed or unlicensed manufacturers and importers for violations of specific sections of the Act. The regulation describes when a Warning Notice for a first offense shall be issued, which first offenses shall result in a license suspension and the length of time of such suspension, and that a second or subsequent offense for any violation of the specific sections listed shall result in both a 30–day suspension or revocation and a fine. The regulation also allows for a reduction in the length of suspension or reduction of a revocation to a 30–day suspension if mitigating circumstances are present.

Regulation 46060. Mitigating Circumstances.

This regulation provides some examples of evidence that may be considered for purposes of determining whether mitigating circumstances exist.

Regulation 46070. Determination of Fine.

This regulation discusses the fines imposed upon licensed or unlicensed retailers, wholesalers and distributors, and manufacturers and importers. The regulation explains the mandatory fine imposed on retailers under Business and Professions Code section 22974.5. The regulation further provides which violations will result in a fine of \$1,000 for the second and any subsequent violations, and which violations will result in a fine of \$1,000 for a second offense, with each subsequent violation resulting in an increase in the fine by \$1,000, up to a maximum fine of \$5,000. With respect to seizures of cigarettes, the regulation imposes fines as follows: (1) for a seizure of less than 20 packages of unstamped cigarettes, the fine for a second offense will be \$2,000 and for each subsequent offense the fine shall increase \$1,000 up to a maximum of \$5,000 per offense; and (2) for a seizure of more than 20 packages of unstamped cigarettes, the fine for a second offense will result in a fine of \$5,000 or five times the retail value of cigarettes or tobacco products seized, whichever is greater, and the \$5,000 fine shall be increased to \$10,000 for a third offense, \$15,000 for a fourth offense, \$20,000 for a fifth offense, and \$50,000 for a sixth and subsequent offenses. In addition, any fines imposed under this regulation will be reduced by the amount of any fine imposed as a result of a misdemeanor citation issued for the same violation.

Regulation 46080. Collection of Fines.

This regulation specifies that the Board shall collect fees, fines, and penalties in compliance with the provisions of the Fee Collection Procedures Law set forth in Revenue and Taxation Code, Part 30, Division 2, Chapter 4, commencing with section 55121.

Regulation 46090. Right to Appeal.

This regulation describes that every licensed or unlicensed person has the right to appeal any violation of the Act, and may appeal a Warning Notice or Notice of Violation. The regulation explains that if the Notice of Violation contains a penalty for revocation and/or a fine of more than \$2,500, and timely appeals are made, then the matter may be heard by the Board Members pursuant to a Board Hearing. For Warning Notices or Notices of Violation containing a suspension and/or fine of \$2,500 or less, the decision of the Board's Appeals Division is the final step in the appeals process.

Regulation 47000. Appeal — Excise Taxes and Fees Division.

This regulation discusses how to request an appeal with the Board's Excise Taxes and Fees Division, the Excise Taxes and Fees Division's conference procedures, and in the event the licensee or unlicensed person disagrees with the Notice of First Decision, how he or she may appeal the decision. In the event a timely appeal is not filed, then the licensee or unlicensed person shall be deemed to have waived his or her right to further appeal, and the Notice of First Decision and the penalty or penalties stated therein shall become final.

Regulation 47010. Appeal — Appeals Division.

This regulation discusses how to request an Appeals conference with the Board's Appeals Division, the Appeals Division's conference procedures, and appeal procedures in the event the licensee or unlicensed person disagrees with the Notice of Second Decision and the Notice of Second Decision upholds a penalty of revocation and/or a fine of more than \$2,500. In the event a timely appeal is not filed, then the licensee or unlicensed person shall be deemed to have waived his or her right to a Board Hearing and the Notice of Second Decision and the penalty or penalties stated therein shall become final. If the Notice of Second Decision does not uphold a revocation and/or fine of more than \$2,500, the Notice of Second Decision and the penalty or penalties stated therein will be final.

Regulation 47020. Appeal — Board Hearing.

This regulation discusses how a request for a Board Hearing should be filed and the procedures for a Board Hearing.

Regulation 47030. Seizures and Forfeitures.

This regulation describes situations where cigarettes or tobacco products may be seized under certain statutes and that such seized products are forfeited to the state unless a timely petition for release of seized property is filed. The regulation further describes what evi-

dence can be provided that may result in the return of the seized property.

COST OR SAVINGS TO STATE OR LOCAL AGENCIES OR SCHOOL DISTRICTS

The Board has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts. Further, the Board has determined that the proposed regulatory action will result in no direct or indirect cost or savings to any state agency, or any local agency or school district that is required to be reimbursed under Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code, or other non–discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

EFFECT ON BUSINESS

Pursuant to Government Code section 11346.5(a)(8), the Board makes an initial determination that the proposed Regulations will not have a significant statewide adverse economic impact directly affecting business.

The adoption of the proposed regulations will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, nor create or expand business in the State of California.

The regulations proposed will not be detrimental to California businesses in competing with businesses in other states.

The proposed regulations may affect small business.

COST IMPACT ON PRIVATE PERSON OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

SIGNIFICANT EFFECT ON HOUSING COSTS

No significant effect.

FEDERAL REGULATIONS

The proposed regulations have no comparable federal regulations.

AUTHORITY

Section 22971.2 of the Business and Professions Code.

REFERENCE

The Cigarette and Tobacco Products Licensing Act of 2003. Division 8.6 of the Business and Professions

Code (commencing with section 22970); Revenue and Taxation Code sections 22971, 30102 through 30106, 30435, 30436, 30438, 30473, 30474.1, and 55121; and Penal Code section 853.6.

CONTACT

Questions regarding the substance of the proposed regulatory action should be directed to Ms. Monica Gonzalez Brisbane, (916) 322–0438, email Monica.Brisbane@boe.ca.gov, or Mr. Randy Ferris, (916) 322–0437, email Randy.Ferris@boe.ca.gov, or by mail to: State Board of Equalization, Attn: Monica Gonzalez Brisbane or Randy Ferris, MIC:82, P.O. Box 942879, Sacramento, CA 94279–0082.

Written comments for the Board's consideration, notices of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed regulatory action should be directed to Diane Olson, Regulations Coordinator, telephone (916) 322–9569, fax (916) 324–3984, e-mail Diane.Olson@boe.ca.gov, or by mail to: State Board of Equalization, Attn: Diane Olson, MIC:80, P.O. Box 942879–0080, Sacramento, CA 94279–0080.

ALTERNATIVES CONSIDERED

The Board must determine that no reasonable alternative considered by it or that has otherwise been identified and brought to the Board's attention would be more effective in carrying out the purpose for which this action is proposed, or be as effective and less burdensome to affected private persons than the proposed regulatory action.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an initial statement of reasons and an underscore and strike—out version (express terms) of the proposed regulations. Both of these documents and all information on which the proposal is based are available to the public upon request. The rule-making file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed regulations are available on the Internet at the Board's Web site, http://www.boe.ca.gov.

AVAILABILITY OF FINAL STATEMENT OF REASONS

The final statement of reasons will be made available on the Internet at the Board's Web site following its public hearing of the proposed regulation. It is also available for your inspection at 450 N Street, Sacramento, California.

ADDITIONAL COMMENTS

Following the hearing, the Board may, in accordance with law, adopt the proposed regulations if the text remains substantially the same as described in the text originally made available to the public. If the Board makes modifications which are substantially related to the originally proposed text, the Board will make the modified text, with the changes clearly indicated, available to the public for fifteen days before adoption of the regulations. The text of any modified regulation will be mailed to those interested parties who commented on the proposed regulatory action orally or in writing or who asked to be informed of such changes. The modified regulation will be available to the public from Ms. Olson. The Board will consider written comments on the modified regulation for fifteen days after the date on which the modified regulation is made available to the public.

TITLE 18. STATE BOARD OF EQUALIZATION

NOTICE IS HEREBY GIVEN

The State Board of Equalization, pursuant to the authority vested in the Board by section 15606 of the Government Code, proposes to amend Rule 462.040, Change in Ownership — Joint Tenancies, in Title 18, Division 1 of the California Code of Regulations. A public hearing on the proposed regulations will be held in Room 121, 450 N Street, Sacramento, at 1:30 p.m., or as soon thereafter as the matter may be heard, on December 12, 2006. Any person interested may present statements or arguments orally at that time and place. Written statements or arguments will be considered by the Board if received by December 12, 2006.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The State Board of Equalization proposes to amend Rule 462.040 to address administrative issues experienced by county assessors in implementing certain amendments to the rule that were adopted by the Board effective November 13, 2003.

Real property is reassessed at its current fair market value upon a "change in ownership." Revenue and

Taxation Code¹ sections 60 and 65 prescribe the change in ownership law applied to the creation, transfer, or termination of joint tenancy interests in property. Subdivision (b) of section 65 excludes from change in ownership, the creation or transfer of a joint tenancy interest if, after such creation or transfer, the "transferors are among the joint tenants." After such a creation or transfer of a joint tenancy interest, the transferors who are also transferees become "original transferors" — and a subsequent transfer or termination of a joint tenancy interest does not result in a change in ownership — if the interest vests entirely or in part in an original transferor. When the last original transferor's interest terminates, there is a change in ownership of the entire property.

Effective November 13, 2003, Property Tax Rule 462.040, subdivision (b)(1) provides that joint tenants may become "original transferors" if they transfer their joint tenancy interest to their respective trusts for the benefit of the other joint tenant or joint tenants. The proposed amendments would eliminate the potential of obtaining "original transferor" status by transferring joint tenancy interests into trusts. To prevent those who have relied on the current version of the rule from being adversely impacted by these amendments, the proposed rule amendments will be effective on a prospective basis only.

The express terms of the proposed action, written in plain English, are available from the agency contact person named in this notice.

COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The State Board of Equalization has determined that the proposed amendments to Rule 462.040 does not impose a mandate on local agencies or school districts. Further, the Board has determined that the proposed amendments will not result in direct or indirect costs or savings to any state agency, any costs to local agencies or school districts that are required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code, or other non–discretionary costs or savings imposed on local agencies, or cost or savings in federal funding to the State of California

EFFECT ON BUSINESS

Pursuant to Government Code section 11346.5, subdivision (a)(8), the Board of Equalization makes an initial determination that the amendment of Rule 462.040 will not have a significant statewide adverse economic impact directly affecting business because the proposed rule merely interprets and clarifies existing statutory provisions.

The rule will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California.

The adoption of the rule will not be detrimental to California businesses in competing with businesses in other states.

The rule will not affect small business because the new rule only interprets and clarifies property tax assessment law statutory provisions and does not impose any additional compliance or reporting requirements on taxpayers.

COST IMPACT ON PRIVATE PERSONS OR BUSINESSES

There is no cost impact on private persons or business, as the rule amendments do not impose any additional compliance or reporting requirements on private persons or businesses.

SIGNIFICANT EFFECT ON HOUSING COSTS

No significant effect.

FEDERAL REGULATIONS

Rule 462.040 has no comparable federal regulation.

AUTHORITY

Government Code section 15606, subdivision (a).

REFERENCE

California Constitution, article XIII A, section 2, and Revenue and Taxation Code sections 60 and 65.

CONTACT

Questions regarding the substance of the proposed rule should be directed to: Ms. Carole Ruwart, Senior Tax Counsel, at P.O. Box 942879, 450 N Street, MIC:82, Sacramento, CA 94279–0082, email Carole.Ruwart@boe.ca.gov. Telephone: (916) 322–3682; FAX: (916) 323–3387.

Written comments for the Board's consideration, requests to present testimony, bring witnesses to the public hearing and inquiries concerning the proposed administrative action should be directed to Ms. Diane Olson, Regulations Coordinator, at P.O. Box 942879, 450

¹ All section references are to the Revenue and Taxation Code unless otherwise indicated.

N Street, MIC:80, Sacramento, CA 94279–0080, email <u>Diane.Olson@boe.ca.gov</u>. Telephone: (916) 322–9569, FAX (916) 324–2597.

ALTERNATIVES CONSIDERED

The Board must determine that no reasonable alternative considered by it or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which this action is proposed or be as effective and less burdensome to affected private persons than the proposed action.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board has prepared an initial statement of reasons and an underscored version (express terms) of the rule. Those documents and all information on which the proposal is based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. Requests for copies should be addressed to Ms. Diane Olson, Regulations Coordinator, (916) 322–9569, at P.O. Box 942879, 450 N Street, MIC:80, Sacramento, CA 94279–0080. The express terms of the proposed regulation (rule) are available on the Internet at the Board's website http://www.boe.ca.gov.

AVAILABILITY OF FINAL STATEMENT OF REASONS

The final statement of reasons will be made available on the Internet at the Board's website following its public hearing of the adoption of the rule. It is also available for public inspection at 450 N Street, Sacramento, California.

ADDITIONAL COMMENTS

Following the hearing, the State Board of Equalization may, in accordance with law, adopt the rule if the text remains substantially the same as described in the text originally made available to the public. If the State Board of Equalization makes modifications which are substantially related to the originally proposed text, the Board will make the modified text, with the changes clearly indicated, available to the public for 15 days before adoption of the regulation. The text of the modified rule will be mailed to those interested parties who commented on the proposed regulatory action orally or in writing or who asked to be informed o such changes.

The modified rule will be available to the public from Ms. Olson. The State Board of Equalization will consider written comments on the modified rule for 15 days after the date on which the modified rule is made available to the public.

TITLE 18. FRANCHISE TAX BOARD

As required by section 11346.4 of the Government Code, this is notice that a public hearing has been scheduled to be held at 10:00 a.m., December 18, 2006, at 9645 Butterfield Way, Town Center Golden State Room A/B, Sacramento, California, to consider adoption of section 25137–14 under Title 18 of the California Code of Regulations, authorized under section 25137 of the California Revenue and Taxation Code, pertaining to the use of alternative apportionment methodologies.

An employee of the Franchise Tax Board will conduct the hearing. Thereafter, a report will be made to the three–member Franchise Tax Board for its consideration. Government Code section 15702, subdivision (b), provides for consideration by the three–member Board of any proposed regulatory action if any person makes such a request in writing. The three–member Board will consider the proposed regulation and comments submitted with respect to the proposed regulation prior to acting upon it at one of its meetings.

Interested persons are invited to present comments, written or oral, concerning the proposed regulatory action. It is requested, but not required, that persons who make oral comments at the hearing also submit a written copy of their comments at the hearing.

WRITTEN COMMENT PERIOD

Written comments will be accepted until 5:00 p.m., December 18, 2006. All relevant matters presented will be considered before the proposed regulatory action is taken. Comments should be submitted to the agency officer named below.

AUTHORITY & REFERENCE

Section 19503 of the Revenue and Taxation Code authorizes the Franchise Tax Board to prescribe regulations necessary for the enforcement of Part 10 (commencing with section 17001), Part 10.2 (commencing with section 18401), Part 10.7 (commencing with section 21001) and Part 11 (commencing with section 23001) of the Revenue and Taxation Code. The proposed regulatory action interprets, implements, and makes specific section 25137 of the Revenue and Taxation Code.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW

Taxpayers who have business activities within and without California are required to determine the amount of income properly attributed to activities in California by use of the Uniform Division of Income for Tax Purposes Act (UDITPA), Section 25120 et seq., Revenue and Taxation Code (RTC). Under UDITPA, business income is assigned to a state through the application of a three-factor apportionment formula that separately compares a business' property, payroll and sales within California to those values everywhere. These percentages are then added together, with the sales factor counted twice (see RTC section 25128), and the resulting sum of these four factors is then divided by four. This percentage is then applied to the business income of the taxpayer to determine the percentage of business income attributable to California.

The three–factor apportionment formula was adopted as a way of reflecting the different elements that provide value to a taxpayer's operation in a given state. The payroll factor reflects the amount of labor utilized by the taxpayer in performing its activities in the state. The property factor reflects the amount of capital utilized by the taxpayer in the state. The sales factor reflects the market for the goods or services of the taxpayer in the state. It has been stated that the purpose of the sales factor is "to give weight to the obtaining of markets," balancing to some extent property and payroll factors that favor production or manufacturing states.

The sales factor component of the UDIPTA apportionment formula has two assignment rules. Sales of tangible property are generally assigned to the location of the customer (the "destination" rule contained in RTC section 25135). If sales of tangible property are made into a destination where the taxpayer is not taxable, then the sales are "thrown back" to the jurisdiction from which the property was shipped. Sales of other than tangible property are assigned to the jurisdiction where the income producing activity related to the sale is performed (RTC section 25136). UDITPA also contains a provision, RTC section 25137, which allows for modification of the statutory assignment rules where they do not fairly represent the activities of the taxpayer within the state.

The assignment of sales derived from the provision of services to mutual funds is subject to the income producing activity rules of RTC section 25136. In the case of many service providers, the normal rule of section 25136 works just fine. For example, a company that cleans carpets usually will have its employees perform the income producing activity (carpet cleaning) in the same state as the customer, therefore assigning the receipt to that state does reflect the market for the taxpay-

er. It is only when a service provider undertakes its income producing activity in a sole location, or very few locations, while having a market throughout the country, that the rules of section 25136 break down. Mutual fund service providers are an example of such a service provider.

For mutual fund service providers, the income producing activity, and most of the cost of performance, relates to services provided by their employees. Because of this, the location of the employees is almost always the location where the receipts will be assigned under normal sales factor rules. The result is that the sales factor will essentially mirror the payroll factor. Similarly, the property factor also reflects the location of the employees, as the property factor is primarily composed of the offices and equipment used by the employees performing the services. However, in contrast to the carpet cleaning company example, the customers of these companies are the fund shareholders, who receive the benefit of the services in locations scattered amongst all fifty states. Because the services are concentrated to one location, the receipts follow, even though this is not indicative of the market.

For this reason, many states have changed the sales factor rules for mutual fund service providers to allow them to assign their sales factor utilizing a ratio of shares owned by shareholders in this state to shares owned by shareholders located everywhere. This allows a reflection of the actual market and corrects the over—taxation of in—state mutual fund service providers by assigning receipts outside of the home state. Similarly, if the service provider were located outside of the state, rather than having a zero numerator in the California sales factor, they would have a factor based on the market through the reflection of shares owned by California shareholders.

The proposed regulation essentially adopts a similar shareholder location sales factor approach to that adopted in other states where mutual fund service providers are located.

Subsection (a) of the proposed regulation addresses the definitions of the various terms contained in the rules to follow. These definitions were largely taken from regulatory language utilized in other states and therefore provide a level of uniformity.

Subsection (b) of the proposed regulation contains the new apportionment rules for mutual fund service providers. The only divergence from the normal UDIT-PA rules is in regards to the sales factor. The proposed regulation adopts a shareholder ratio approach calculated on a fund-by-fund basis (See subsection (b)(1)(A)).

Subsection (b)(1)(A)1 contains rules regarding the assignment of shares owned by a shareholder of record that holds the shares for the benefit of a separate ac-

count. The rule allows these shares to be assigned based on a reasonable method derived from information received from the shareholder of record. If no information is received, then the shares are disregarded in determining the ratio for the given fund.

Subsection (b)(1)(B) provides rules for the assignment of receipts from asset management services. The rule only applies to unitary businesses that are also mutual fund service providers. This was done to limit the scope of the regulation. The rule adopts a domicile concept to represent the market. It also provides rules for pension plans and other entities and assigns these based on the domicile of the beneficiaries under subsection (b)(1)(B)(i) and, if this is not known, by a reasonable method to approximate this information statistically. Subsection (b)(1)(B)(ii). If no method is developed, these receipts are excluded.

Subsection (b)(1)(C) sets forth an approach to deal with the assignment of receipts to California when the underlying entity providing the services to California shareholders is not a California taxpayer. This section is included to make sure that there will be market assignment of receipts based on the activities of the entire unitary group rather than on an entity—by—entity basis. It is fairly common for mutual fund service providers to separate their various service activities into separate entities for regulatory or other purposes. Nevertheless, it is the group, acting as a unitary business, which provides all of the services required by the funds. The regulation recognizes this by assigning receipts on a unitary basis.

Subsections (b)(1)(C)1 and 2 then contain all of the rules necessary to implement this approach in determining the combined report business income to be assigned to each taxpayer member of the mutual fund service provider.

Subsection (b)(1)(D) contains a throwback rule based on the activities of all members of the unitary business. If no member of the mutual fund service provider's unitary business is taxable in a given state, then the receipts assigned to that state are thrown back to the state where the general rules of RTC section 25136 would have assigned the receipts. This rule is necessary to eliminate nowhere income concerns, the same concerns that gave rise to the throwback rule contained in RTC section 25135.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

Mandate on local agencies and school districts: None. Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed under Part 7, commencing with Government Code section 17500, of Division 4: None. Other non-discretionary cost or savings imposed upon local agencies: None.

Cost or savings in federal funding to the state: None.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None.

Potential cost impact on private persons or businesses affected: The Franchise Tax Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant effect on the creation or elimination of jobs in the state: None.

Significant effect on the creation of new businesses or elimination of existing businesses within the state: None

Significant effect on the expansion of businesses currently doing business within the state: None. In–state mutual fund service providers have asked for and received relief under the provisions of RTC section 25137 on an individual basis in the past. This regulation therefore should not change their behavior.

Effect on small business: The regulation is generally utilized by large multinational corporations and not small businesses.

Significant effect on housing costs: None.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no alternative considered by it would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulatory action.

The proposed regulatory action pertains to corporate taxpayers and therefore does not affect private persons.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

An initial statement of reasons has been prepared setting forth the facts upon which the proposed regulatory action is based. The statement includes the specific purpose of the proposed regulatory action and the factual basis for determining that the proposed regulatory action is necessary.

The express terms of the proposed text of the regulation and the initial statement of reasons and the rule-making file are prepared and available upon request from the agency contact person named in this notice. When the final statement of reasons is available, it can be obtained by contacting the agency officer named below, or by accessing the Franchise Tax Board's website mentioned below.

CHANGE OR MODIFICATION OF ACTIONS

The proposed regulatory action may be adopted by the three–member Franchise Tax Board after consideration of any comments received during the comment period.

The regulation may also be adopted with modifications if the changes are nonsubstantive or the resulting regulation is sufficiently related to the text made available to the public so that the public was adequately placed on notice that the regulation as modified could result from that originally proposed. The text of the regulation as modified will be made available to the public at least 15 days prior to the date on which the regulation is adopted. Requests for copies of any modified regulation should be sent to the attention of the agency officer named below.

ADDITIONAL COMMENTS

If you plan on attending or making an oral presentation at the regulation hearing, please contact the agency officer named below.

The hearing room is accessible to persons with physical disabilities. Any person planning to attend the hearing who is in need of a language interpreter or sign language assistance, should contact the officer named below at least two weeks prior to the hearing so that the services of an interpreter may be arranged.

CONTACT

All inquiries concerning this notice or the hearing should be directed to Colleen Berwick at the Franchise Tax Board, Legal Branch, P.O. Box 1720, Rancho Cordova, CA 95741–1720; Telephone (916) 845–3306; Fax (916) 845–3648; E–Mail: colleen berwick@ftb.ca.gov. The notice, initial statement of reasons and express terms of the regulation are also available at the Franchise Tax Board's website at www.ftb.ca.gov.

TITLE 22. CALIFORNIA MEDICAL ASSISTANCE COMMISSION

Amendment of Conflict of Interest Code Section 100540, Title 22, California Code of Regulations

CONFLICT OF INTEREST CODE

Notice of Rulemaking and Public Comment Period

NOTICE IS HEREBY GIVEN that pursuant to Government Code sections 87300 to 87302 and 87306, the

California Medical Assistance Commission (CMAC) proposes to amend its employee conflict of interest code, section 100540 of title 22 of the California Code of Regulations.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

This proposed amendment will only affect CMAC employees. The Political Reform Act (Government Code sections 81000 et seq.) requires each state and local government agency to adopt and promulgate a conflict of interest code, identifying those classifications of employees required to complete a statement of economic interest in accordance with Government Code section 87302. CMAC's conflict of interest code is located in section 100540 of title 22 of the California Code of Regulations.

CMAC's conflict of interest code designates the CMAC Commissioners and employees who must disclose in a statement of economic interest certain investments, income, interests in real property and business positions, and who must disqualify themselves from making or participating in the making of governmental decisions affecting those interests.

This proposed amendment revises the disclosure obligations for some CMAC employees from full disclosure to modified disclosure to target CMAC related activities; repeals those classifications that do not make independent decisions, participant in the making of decisions, or enter into negotiations; and makes other technical changes to update the disclosure category descriptions to reflect CMAC's current organizational structure.

AUTHORITY

This regulation is being adopted pursuant to Welfare and Institutions Code sections 14082, 14082.5, and 14165.4, and Government Code section 11152.

REFERENCE

The statutory reference for this regulatory action are Government Code sections 87300 to 87302 and 87306.

FISCAL IMPACT STATEMENTS

CMAC does not anticipate any cost associated with this regulatory change.

<u>Costs or Savings in Federal funding to the State:</u> No costs or savings are anticipated.

<u>Costs or Savings to Any State Agency:</u> No costs or savings are anticipated.

<u>Costs or Savings to Any Local Agency or School District:</u> No costs or savings are anticipated.

Nondiscretionary Costs or Savings Imposed on Local Agencies: This regulatory action will not result in any nondiscretionary costs or savings to local agencies.

<u>Local Mandate Determination:</u> CMAC has determined that this regulatory action will not impose any new mandates on school districts or other local governmental agencies or any mandates which must be reimbursed by the State pursuant to Part 7 (commencing with Section 17500), Division 4 of the Government Code.

Cost Impacts on Representative Private Persons or Businesses: CMAC is not aware of any cost impacts that a representative private persons or business would necessarily incur in reasonable compliance with the proposed action.

<u>Effect on Business:</u> CMAC does not anticipate any adverse economic impact on business because this regulatory change affects only CMAC employees.

CMAC has made an initial determination that his regulatory action will not have a significant statewide adverse economic impact directly affecting businesses. This regulatory action will not affect the ability of California businesses to compete with businesses in other states. This regulatory action will not affect the creation or elimination of jobs, the creation of new businesses, the elimination of existing businesses, or the expansion of businesses currently doing business within the State of California.

<u>Effect on Small Businesses:</u> The proposed regulatory action will not affect small businesses. CMAC has determined that this regulatory action will result in no cost or savings to small businesses because the regulatory action affects only CMAC employees.

<u>Effect on Housing Costs:</u> This regulatory action will not affect housing costs in any way.

WRITTEN COMMENT PERIOD

Any interested person or his authorized representative may submit written comments on the proposed regulatory action. The written comment period closes at 5 p.m. on December 11, 2006. CMAC cannot accept written comments after the close of the public comment period. Please send written comments to Denise DeTrano, General Counsel, California Medical Assistance Commission, 770 L Street, Suite 1000, Sacramento, CA 95814. Comments may also be submitted by fax at (916) 324–5597 or email at ddetrano@cmac.ca.gov.

SCOPE OF TESTIMONY

Government Code section 11346.8, subdivision (c), prohibits CMAC from making changes to the text of a noticed regulation after the public hearing, unless the

change was so sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed action. Therefore, please make your comments specific to the regulation discussed in this notice. Please indicate the number of the section you would like changed. The section change requested. And the reason why you would like the section changed. Since CMAC cannot make changes to sections of the regulation which were not mentioned in this public notice, during the public comment period CMAC will not consider testimony regarding changes which are outside the scope of this notice.

If you wish to request CMAC to amend, adopt, or repeal additional regulatory sections, CMAC is required to consider those changes in a separate regulatory action

PUBLIC HEARING

CMAC has not scheduled a public hearing on the proposed regulatory action. However, if any person wishes to submit oral comments, CMAC will schedule a public hearing upon receipt of that person's written request. Such request must be received at the address shown above no later than 15 days prior to the close of the written comment period.

CONSIDERATION OF ALTERNATIVES

Pursuant to Government Code section 11346.5, subdivision (a), item (13), CMAC must determine that no reasonable alternative considered by CMAC or that has otherwise been identified and brought to the attention of CMAC would be more effective in carrying out the purpose for which this regulatory action was taken. CMAC must also determine that no alternative would be as effective and less burdensome to affected private persons than the regulatory action taken. CMAC will consider any alternatives presented during the public comment period.

ADDITIONAL CHANGES

CMAC may modify the proposed regulation in response to testimony received during the 45–day public comment period, so long as any additional changes made are sufficiently related to the proposed regulatory action and within the scope of this notice. CMAC will make available to any interested persons, for at least 15 days prior to the date on which CMAC adopts, amends, or repeals the resulting regulation, the full text of any regulation which is changed or modified from the express terms to this regulatory action. CMAC will mail a copy of the additional changes to any person who testified or submitted comments during the public hearing

(if one is requested), who submitted written comments during the 45–day public comment period, or who requested copies of additional changes. Please call the CMAC contact person listed below if you wish to receive a copy of any additional changes and you do not plan to present comments regarding the proposed regulatory action.

AVAILABILITY OF TEXT OF REGULATIONS AND INITIAL STATEMENT OF REASONS

CMAC has prepared and has available for review upon request the text of the proposed regulations discussed in this notice, written in plain English; an initial statement of reasons, explaining the necessity for each regulatory change; and all the information upon which the proposed regulations were based. To obtain a copy, please call Denise DeTrano at (916) 324–2726 or write to her at the address shown on the first page of this notice. If you received this public notice in the mail, the text of the proposed regulation and the initial statement of reasons were enclosed.

PERSON TO CONTACT FOR ADDITIONAL INFORMATION

CMAC's contact for this regulation package is Denise DeTrano, CMAC's General Counsel, at (916) 324–2726. Ina Pewitt is the backup contact.

FINAL STATEMENT OF REASONS

After the close of the 45–day public comment period, CMAC will summarize and respond to all public comments in a written final statement of reasons. To obtain a copy of the final statement of reasons, please call Denise DeTrano at (916) 324–2726.

GENERAL PUBLIC INTEREST

AIR RESOURCES BOARD

NOTICE OF CONTINUATION

NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO THE HEXAVALENT CHROMIUM AIRBORNE TOXIC CONTROL MEASURE FOR CHROME PLATING AND CHROMIC ACID ANODIZING OPERATIONS

The Air Resources Board (the Board or ARB) will conduct a continuation of a public hearing at the time

and place noted below to consider adopting amendments to the existing Hexavalent Chromium Airborne Toxic Control Measure (ATCM) for Chrome Plating and Chromic Acid Anodizing Operations (Chromium Plating ATCM). This item was heard at the September 28, 2006 hearing and was continued to the date, time, and place listed below for further consideration.

DATE: November 16, 2006

TIME: 9:00 a.m.

PLACE: California Public Utilities Comission

Auditorium 505 Van Ness Ave. San Francisco, CA 94102

This item will be considered at a two—day meeting of the Board, which will commence at 9:00 a.m., November 16, 2006, and may continue at 8:30 a.m., November 17, 2006. This item may not be considered until November 17, 2006. Please consult the agenda for the meeting, which will be available at least 10 days before November 16, 2006, to determine the day on which this item will be considered.

For individuals with sensory disabilities, this document is available in Braille, large print, audiocassette, or computer disk. Please contact ARB's Disability Coordinator at (916) 323–4916 by voice or through the California Relay Services at 711, to place your request for disability services. If you are a person with limited English and would like to request interpreter services, please contact ARB's Bilingual Manager at (916) 323–7053.

THE CONTINUED HEARING

The continued hearing will be conducted as described in the original notice, except that written submissions must be addressed to and received by the Clerk of the Board as described below. All comments submitted for the September 28, 2006, hearing will remain part of the rulemaking record. The original notice, the ISOR and all subsequent regulatory documents, including the FSOR when completed, are or will be available on the ARB Internet site for this rulemaking at www.arb.ca.gov/regact/chrom06/chrome06.htm and

www.arb.ca.gov/regact/chrom06/chrome06.htm and are available as described in the original notice.

SUBMITTAL OF COMMENTS

The public may present comments relating to this matter orally or in writing at the hearing, and in writing or by e-mail before the hearing. To be considered by the Board, written submissions not physically submitted at the hearing must be **received no later than 12:00 noon, November 15, 2006,** and addressed to the following:

Postal mail is to be sent to:

Clerk of the Board, Air Resources Board 1001 I Street, Sacramento, California 95814 Electronic submittal:

http://www.arb.ca.gov/lispub/comm/bclist.php

Facsimile submittal: (916) 322-3928

The Board requests but does not require 30 copies of any written statement be submitted and that all written statements be filed at least ten days prior to the hearing so that ARB staff and Board Members have time to fully consider each comment. The Board encourages members of the public to bring to the attention of staff in advance of the hearing any suggestions for modification of the proposed regulatory action.

Inquiries concerning the substance of the proposed regulation may be directed to the designated agency contact persons, Carla Takemoto, Manager of the Technical Evaluation Section, at (916) 324–8028 or by email at ctakemot@arb.ca.gov, or Shobna Sahni, Air Pollution Specialist, at (626) 575–7039 or by email at spandhoh@arb.ca.gov.

DEPARTMENT OF FISH AND GAME

CONSISTENCY DETERMINATION

Fish and Game Code Section 2080.1 Tracking Number 2080–2006–021–03

PROJECT: Fisheries Restoration Projects

within the Geographic Boundaries of NMFS's Santa Rosa, California,

Field Office

LOCATION: Mendocino County to San Luis

Obispo County

NOTIFIER: NOAA National Marine Fisheries

Service, Santa Rosa Field Office

BACKGROUND

The U.S. Army Corps of Engineers ("Corps") intends to authorize up to 500 salmonid habitat restoration projects ("projects") over a ten year period in streams and adjacent riparian areas within the geographic boundaries of NMFS's Santa Rosa Field Office from Mendocino to San Luis Obispo Counties ("Program"). The Program creates a process for the Corps to streamline permitting requirements for landowners and agencies to complete those projects. NOAA's Restoration Center ("NOAA RC") will be responsible for administering the Program. The types of projects that will be authorized under the Program include instream habitat improvements, fish passage improvements, bank stabilization, riparian habitat restoration, upslope watershed restoration, and fish screens.

The watersheds in Mendocino County south to the headwaters of the Salinas River in San Luis Obispo County are known to have populations Central California Coast ("CCC") coho salmon, in addition to other salmonids. CCC coho is listed as an endangered species under both the federal Endangered Species Act ("ESA") (16 U.S.C. § 1531 et seq.) and the California Endangered Species Act ("CESA") (Fish & G. Code, § 2050 et seq.). The Eel River watershed of Mendocino County is known to have populations of Southern Oregon/Northern California Coast ("SONCC") coho salmon, which is listed as a threatened species under both ESA and CESA.

Stream dewatering, stream flow diversion, fish relocation, equipment refueling, and other activities necessary to implement some of the projects that will be authorized under the Program could result in take of CCC and SONCC who salmon. As a result, the Corps consulted with NMFS. On June 21, 2006, NMFS issued a biological opinion (No. 151422SWR2006SR00190: JMA) to the Corps for the Program. The biological opinion describes the Program and the types of projects the Program will authorize and sets forth measures to minimize project impacts to CCC and SONCC coho salmon.

On August 29, 2006, the Director of the Department of Fish and Game ("DFG") received a letter from NMFS requesting a determination pursuant to Fish and Game Code section 2080.1 that the biological opinion is consistent with CESA.

DETERMINATION

For projects covered under the biological opinion, DFG has determined that the biological opinion is consistent with CESA because the mitigation measures in the opinion meet the conditions set forth in Fish and Game Code section 2081, subparagraphs (b) and (c), for authorizing the incidental take of CESA-listed species. Specifically, DFG finds that the take of CCC and SONCC coho salmon will be incidental to an otherwise lawful activity (i.e., implementing salmonid habitat restoration projects under the Program); the measures identified in the biological opinion will minimize and fully mitigate the impacts of the authorized take of CCC and SONCC coho; and the projects under the Program will not jeopardize the continued existence of those species. The avoidance, minimization, and mitigation measures include, but are not limited to, the following:

- A qualified fisheries biologist shall monitor project sites during construction to prevent adverse and unforeseen effects to listed salmonids.
- 2. A spill prevention plan reviewed and approved by NOAA RC shall be in place prior to construction.
- 3. The general construction season shall be from June 15 to October 15. Restoration, construction,

fish relocation, and dewatering activities within any wetted and/or flowing creek channel shall only occur within this window.

- 4. The length of stream dewatered per project shall not exceed 300 feet, the disturbance footprint for a project's staging areas may not exceed 0.25 acre, and overstory canopy cover may not be reduced by more than 20% (per linear 100 feet) within 75 feet of a watercourse or lake transition line as measured by a spherical densitometer (using a minimum of four measurements for each cardinal direction).
- 5. A buffer of 1,200 linear feet will be placed between projects implemented within the same year within the same watershed under the Program in order to minimize the potential for short term accumulation of adverse impacts within a stream.
- For projects funded by grants, the funding assurance shall be the grant/agreement itself, showing monies earmarked for implementation of protection measures necessary during implementation and follow-up monitoring, or another mechanism approved by DFG in writing. For projects that do not have grant funding, the applicant shall be required to provide security in the form of a cash deposit in an amount approved in writing by DFG and held by DFG or another mechanism approved in writing by DFG. The funding security will be held until the required measures have been successfully implemented.
- 7. The projects implemented under the Program will improve CCC and SONCC coho salmon habitat that will enhance their passage, survival, and reproduction.

If the Program or projects it covers as described in the biological opinion, including the mitigation measures therein, changes after the date of the opinion, or if NMFS amends or replaces that opinion, a new consistency determination (in accordance with Fish and Game Code section 2080.1) or a separate incidental take permit (in accordance with Fish and Game Code section 2081) from DFG will be required.

DEPARTMENT OF FISH AND GAME

Department of Fish and Game —
Public Interest Notice
For Publication October 27, 2006
CESA CONSISTENCY DETERMINATION FOR
I–5 Cosumnes River Blvd Interchange Project
Sacramento County

The Department of Fish and Game ("Department") received a notice on October 3, 2006 that the City of

Sacramento proposes to rely on consultations between federal agencies to carry out a project that may adversely affect species protected by the California Endangered Species Act ("CESA"). This project consists of the extension of Cosumnes River Boulevard to an interchange at I–5, then to an intersection at Freeport Boulevard in Sacramento County. The activities will result in temporary impacts to 3.244 acres and permanent impacts to 0.079 acres of giant garter snake (*Thamnophis gigas*) habitat.

A no jeopardy federal biological opinion 1–1–04–F–0363 was issued to the Federal Highway Administration by the U.S. Fish and Wildlife Service ("Service") on March 11, 2005 which considers impacts to the federally and state threatened giant garter snake. The biological opinion requires implementation of certain measures that will minimize and mitigate impacts to giant garter snake and its habitat.

Pursuant to California Fish and Game Code Section 2080.1, the City of Sacramento is requesting a determination that the biological opinion is consistent with CESA. If the Department determines that the biological opinion is consistent with CESA, the City of Sacramento will not be required to obtain a separate permit under CESA (Fish and Game Code Section 2081(b)) for the proposed project.

DEPARTMENT OF FISH AND GAME

Department of Fish and Game —
Public Interest Notice
For Publication October 27, 2006
CESA CONSISTENCY DETERMINATION FOR
I–5 French Camp Road Extension Project
San Joaquin County

The Department of Fish and Game ("Department") received a notice on September 29, 2006 that the City of Stockton proposes to rely on consultations between federal agencies to carry out a project that may adversely affect species protected by the California Endangered Species Act ("CESA"). This project consists of the widening of the I–5 bridges over French Camp Slough and the construction of new bridges over French Camp Slough east of I–5 as part of the extension of Sperry Road in San Joaquin County. The activities could result in impacts to giant garter snake (*Thamnophis gigas*), riparian brush rabbit (*Syvilagus bachmani riparus*), and Delta Smelt (*Hypomesus transpacificus*) habitats.

A no jeopardy federal biological opinion 1–1–05–I–1821 was issued to the Federal Highway Administration by the U.S. Fish and Wildlife Service ("Service") on September 19, 2005 which considers impacts to the above–listed species. The biological opinion determined that the project was within the

scope of the San Joaquin Multiple Species Conservation Plan and that implementation of certain measures would minimize and mitigate impacts to giant garter snake, riparian brush rabbit, and Delta smelt.

Pursuant to California Fish and Game Code Section 2080.1, the City of Stockton is requesting a determination that the biological opinion is consistent with CESA. If the Department determines that the biological opinion is consistent with CESA, the City of Stockton will not be required to obtain a separate permit under CESA (Fish and Game Code Section 2081(b)) for the proposed project.

FISH AND GAME COMMISSION

NOTICE OF RECEIPT OF PETITION

NOTICE IS HEREBY GIVEN that, pursuant to the provisions of Section 2073.3 of the Fish and Game Code, the California Fish and Game Commission, on October 3, 2006, received a petition from the Center for Biological Diversity, Klamath–Siskiyou Wildlands Center, and Environmental Protection Information Center to list the Scott Bar Salamander (*Plethodon asupak*) as an endangered species.

Scott Bar Salamanders require moist microclimates and are associated with conditions found in older, undisturbed forest with a closed canopy and rocky substrates dominated by cobble-sized pieces.

Pursuant to Section 2073 of the Fish and Game Code, on October 12, 2006, the Commission transmitted the petition to the Department of Fish and Game for review pursuant to Section 2073.5 of said code. The Department's evaluation and recommendation relating to the petition will be received by the Commission at its February 2007 meeting. Interested parties may contact Mr. Eric Loft, Chief, Wildlife Programs Branch, Department of Fish and Game, 1812 Ninth Street, Sacramento, CA 95814, or telephone (916) 445–3406 for information on the petition or to submit information to the Department relating to the petitioned species.

OFFICE OF ADMINISTRATIVE LAW

REQUEST FOR PUBLIC INPUT ANNUAL RULEMAKING CALENDAR GOVERNMENT CODE 11017.6

Each year all state government agencies with rule-making authority are required to prepare a rulemaking calendar pursuant to section 11017.6 of the Government Code. The rulemaking calendar lists anticipated rulemaking activity by the agency for the coming year.

The rulemaking calendar is non-binding. Section 11017.6 specifically allows agencies to adopt rules that were not listed in the rulemaking calendar if it is required by unanticipated circumstances.

The requirement to prepare a rulemaking calendar was established in 1982 and has not been amended since 1987. In 2000 the Legislature adopted section 11340.85 of the Government Code, which requires state agencies to post all their rulemaking activity on their web sites. The information that must be posted on the web pursuant to section 11340.85 is much more extensive than that included in the annual rulemaking calendar pursuant to section 11017.6. Use of the internet as a primary information source has, obviously, increased greatly since 1982.

The Office of Administrative Law is attempting to evaluate the public's current level of reliance upon the annual rulemaking calendar as a source of information about state agency rulemaking. If you have found that the annual rulemaking calendar continues to be a valuable source of information to you, please let us know through one of the following methods:

- 1. Send an e-mail message to staff@oal.ca.gov;
- 2. Send a note via fax to (916) 323–6826;
- 3. Leave a telephone voice message at (916) 323–6815; or
- 4. Send a letter to:

Office of Administrative Law Rulemaking Calendar Survey 300 Capitol Mall, Suite 1250 Sacramento, CA 95814

Any information that you could provide on this subject would be greatly appreciated.

RULEMAKING PETITION DECISIONS

CORRECTIONS STANDARDS AUTHORITY

NOTICE OF DECISION TO REPEAL, AMEND, OR ADOPT REGULATIONS

Minimum Standards for Local Juvenile Facilities California Code of Regulations Title 15, Crime Prevention and Corrections Division 1, Chapter 1, Subchapter 5

PETITIONER

Donald Specter, Prison Law Office

AUTHORITY

Welfare and Institutions Code Section 210 states, "The Board of Corrections¹ shall adopt minimum standards for the operation and maintenance of juvenile halls for the confinement of minors." Welfare and Institutions Code Section 885(a) states, "The Board of Corrections shall adopt and prescribe the minimum standards of construction, operation, programs of education and training, and qualifications of personnel for juvenile ranches, camps, or forestry."

CONTACT PERSON

Please direct any inquiries regarding this action to Mr. Gary Wion, Field Representative, Corrections Standards Authority, 600 Bercut Drive, Sacramento, CA 95814.

AVAILABILITY OF PETITION

The petition to amend regulations is available upon request. Direct inquires to the Department's contact person.

SUMMARY OF PETITION

Petitioner requests the Corrections Standards Authority (CSA) to amend Title 15, Division 1, Chapter 1, Subchapter 5, Section 1377, California Code of Regulations (CCR) to specify that an attorney or court may designate other persons to act on their behalf as attorney representatives.

DEPARTMENT DECISION

The Executive Director of the Corrections Standards Authority denied the petition to amend Title 15, Division 1, Chapter 1, Subchapter 5, Section 1377, CCR, and the denial will be published in the California Notice Register on October 27, 2006.

The Petitioner requests that CSA amend Title 15, Section 1377 to specify that an attorney or court may designate other persons to act on their behalf as attorney representatives. The Petitioner states that their litigation assistant was denied access to interview three minors housed at the Sacramento County Juvenile Hall in September 2006.

The Petitioner states that State prison regulations permit attorney representatives to visit under the same circumstances as licensed attorneys. The Petitioner states that in Procunier v. Martinez, 416 U.S. 396, 419–421 (1974), the Supreme Court upheld a district court order invalidating a California prison regulation that limited attorney visits to licensed investigators or members of that state's bar. The Petitioner requests that "the regulation be amended to explicitly require counties to allow legal representatives to visit minors in juvenile facilities. The proposed amendment would make the regulation consistent with the regulations applicable to state prisons and the controlling decision of the U.S. Supreme Court."

CSA utilizes the "Executive Steering Committee" model for managing the regulation revision and adoption process. This is a formal process where the CSA Board will appoint an Executive Steering Committee chair to oversee a committee which will select subject matter experts, local administrators and managers, to serve as workgroup members to review *Minimum Standards for Local Juvenile Facilities* Titles 15 and 24, CCR. During this review, the workgroup members will consider repealing, amending, or developing new regulations. The workgroups make recommendations to the Executive Steering Committee proposing changes to Titles 15 and 24, and these recommendations are placed on the CSA Board agenda for consideration.

Statute allows state agencies to utilize subject matter experts, local administrators and managers, in the regulatory review process. Government Code section 11346(b) states, "An agency that is considering adopting, amending, or repealing a regulation may consult with interested persons before initiating regulatory action pursuant to this article." It is further referenced in Government Code section 11346.45(a) "In order to increase public participation and improve the quality of regulations, state agencies proposing to adopt regulations shall, prior to publication of the notice required by Section 11346.5, involve parties who would be subject to the proposed regulations in public discussions regarding those proposed regulations, when the proposed regulations involve complex proposals or a large number of proposals that cannot easily be reviewed during the comment period."

CSA's Juvenile Regulation Workgroup will be meeting on November 1, 2006 to consider public comments made during its 45 day public comment period for Titles 15 and 24. It will be appropriate for this Workgroup to be informed of your petition, and to reconsider reviewing Title 15, Section 1377, before proposing final recommendations to the CSA Board.

¹ The Board of Corrections was renamed the Corrections Standards Authority effective July 1, 2005, as result of SB737.

SUMMARY OF REGULATORY ACTIONS

REGULATIONS FILED WITH SECRETARY OF STATE

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State, Archives, 1020 O Street, Sacramento, CA, 95814, (916) 653–7715. Please have the agency name and the date filed (see below) when making a request.

AIR RESOURCES BOARD

Heavy Duty Truck Idling (New Trucks)

This action amends existing anti-idling provisions by requiring 2008 model year heavy—duty truck engines to have an automatic engine shutdown system or to comply with an optional NOx idling emission standard, applies existing anti-idling requirements to sleeper berth trucks effective January 1, 2008, and establishes emission standards for auxiliary power systems (APS).

Title 13

California Code of Regulations

AMEND: 1956.8, 2404, 2424, 2425, 2485

Filed 10/16/06 Effective 11/15/06

Agency Contact: Alexa Malik (916) 322–4011

AIR RESOURCES BOARD

ATCM Hexavaent Chromium & Nickel from Thermal Spraying

This is a nonsubstantive action that only renumbers the section.

Title 17

California Code of Regulations

AMEND: 93102.5 Filed 10/17/06 Effective 11/16/06

Agency Contact: Alexa Malik (916) 322–4011

BOARD OF BARBERING AND COSMETOLOGY

Preapplication for Examination

This regulatory action updates the preapplication for examination process to include apprentices.

Title 16

California Code of Regulations

AMEND: 928 Filed 10/17/06

Effective 11/16/06

Agency Contact: Paul Cobb

(916) 445–8893

BOARD OF FORESTRY AND FIRE PROTECTION Lake Tahoe Region Exemption, 2006

This regulatory action amends 14 CCR 1038 and revises a definition in §895.1 in order to exempt Timber Harvesting Plan filing requirements of the Forest Practice Act when harvesting live trees in a watercourse and lake protection zone (WLPZ) in the Lake Tahoe region for the purpose of reducing fire hazards. This amendment allows for live tree removal for fuelwood use or other minor forest products only in certain specified areas with specified low impact equipment. Exemptions conducted under this amendment will require a Tree Removal Permit issued by the Tahoe Regional Planning Agency (TRPA) and certified by the Lahontan Regional Water Quality Control Board (RWQCB).

Title 14

California Code of Regulations

AMEND: 895, 895.1, 1038, 1038(f)

Filed 10/11/06 Effective 01/01/07

Agency Contact:

Christopher Zimny

(916) 653-9418

BUREAU OF AUTOMOTIVE REPAIR

Deletion of References to the BAR–90 Test Analyzer System (TAS)

This action makes nonsubstantive corrections to various BAR regulations including repealing references to the obsolete BAR–90 Test Analyzer System (TAS).

Title 16

California Code of Regulations

AMEND: 3303.2, 3340.15, 3340.18, 3340.32,

3340.42, 3394.5 Filed 10/11/06 Effective 10/11/06

Agency Contact: James Allen

(916) 255–4300

CALIFORNIA HORSE RACING BOARD Whips

California Horse Racing Board proposes amendment to 4 CCR 1733 to increase the length of harness drivers' allowed whip from three feet nine inches to four feet.

Title 4

California Code of Regulations

AMEND: 1733 Filed 10/16/06 Effective 11/15/06

Agency Contact: Harold Coburn (916) 263–6397

DEPARTMENT OF FOOD AND AGRICULTURE Diaprepes Root Weevil Interior Quarantine

This is the certificate of compliance making permanent the prior emergency regulatory action (OAL file no. 06–0623–03E) that added approximately three (3) square miles in the Carlsbad area of San Diego County to areas already under quarantine in the county for the Diaprepes root weevil (Diaprepes abbreviatus).

Title 3

California Code of Regulations

AMEND: 3433(b) Filed 10/12/06 Effective 10/12/06

Agency Contact: Steve Cook (916) 229–3043

DEPARTMENT OF FOOD AND AGRICULTURE Bactrocera Zonata Inertior

This is the certificate of compliance for the prior emergency regulatory action (OAL file no. 06–0523–02E) that established approximately 106 square miles in the Fresno area of Fresno and Madera counties as an area under quarantine for the peach fruit fly (Bactrocera zonata), as well as a list of hosts and possible carriers of the peach fruit fly.

Title 3 California Code of Regulations ADOPT: 3424 Filed 10/12/06 Effective 10/12/06

Agency Contact: Stephen Brown (916) 654–1017

DEPARTMENT OF FOOD AND AGRICULTURE Diaprepes Root Weevil Interior Quarantine

This emergency regulatory action will add approximately seven (7) square miles surrounding portions of the La Jolla area and two (2) square miles to the Encinitas area of San Diego County to areas already under quarantine in the county for the Diaprepes root weevil (Diaprepes abbreviatus).

Title 3

California Code of Regulations

AMEND: 3433(b) Filed 10/12/06 Effective 10/12/06

Agency Contact: Stephen Brown (916) 654–1017

DEPARTMENT OF HEALTH SERVICES

Prenatal Screening and Newborn Screening Programs

This filing without regulatory effect simplifies, reorganizes, updates, and corrects regulations concerning prenatal and newborn screening programs.

Title 17

California Code of Regulations

ADOPT: 6500.1, 6500.5, 6500.19, 6500.25, 6500.28, 6500.31, 6500.35, 6500.39, 6500.45, 6500.46, 6500.57, 6500.59, 6500.65, 6500.67, 6500.69, 6500.70, 6500.74, 6500.77, 6500.80, 6501.2, 6502, 6504.2, 6504.4, 6504.6, 6506.2, 6506.6, 6506.8, 6506.10, 6506.12

Filed 10/12/06 Effective 11/11/06 Agency Contact:

Barbara S. Gallaway (916) 657–3197

DEPARTMENT OF INSURANCE

Self-Service Storage Insurance Agent License

AB 2520 of 2004 (Ch.428, Stats 2004) requires the Commissioner of Insurance to license self service storage insurance agents and specifies the type of insurance that may be sold. The regulations define terms, licensing requirements, sets the fee and disclosures that are to be made, as well as record keeping and continuing education requirements. This rulemaking has been previously submitted and withdrawn in October, 2005 (OAL File Number 05–093002E). It was filed again as a new rulemaking in July 9, 2006 (deemed emergency — OAL file number 06–0621–01 E).

Title 10

California Code of Regulations

ADOPT: 2194.9, 2194.10, 2194.11, 2194.12, 2194.12, 2194.13, 2194.14, 2194.15, 2194.16, 2194.17

2194.13, 2194.14, 2194.15, 2194.16, 2194.17

Filed 10/16/06 Effective 10/16/06

Agency Contact: Julie D. Soo (415) 538–4429

DEPARTMENT OF JUSTICE

Bond of Qualifying Individual

This print—only filing is DOJ's approval and printing of Bond to Qualifying Individual in the Title 11 listing of approved surety bonds.

Title 11

California Code of Regulations

AMEND: 30.5 Filed 10/13/06 Effective 01/01/07

Agency Contact: Anne M. Burr (415) 703–1403

DEPARTMENT OF JUSTICE

Contractors Bond

This print—only filing is DOJ's approval and printing of Contractor's Bond in the Title 11 listing of approved surety bonds.

CALIFORNIA REGULATORY NOTICE REGISTER 2006, VOLUME NO. 43-Z

Title 11

California Code of Regulations

AMEND: 30.1 Filed 10/13/06 Effective 01/01/07

Agency Contact: Anne M. Burr (415) 703–1403

DEPARTMENT OF SOCIAL SERVICES

Refugee Resettlement Program Policy amendments

Department of Social Services submitted amendments to regulations in several MPP chapters governing eligibility, assistance, and resettlement programs for refugees, and adding to these programs assistance to immigrants granted asylum or determined to be a victim of trafficking or an unaccompanied refugee minors (URMs), as required under federal law. Text revisions were also made for clarity, re–numbering, and to update cross–references and change in federal agency name.

Title MPP

California Code of Regulations

ADOPT: 44–111, 44–211, 69–201, 69–202, 69–205, 69–207, 69–208, 69–209, 69–210, 69–211, 69–212, 69–213, 69–214, 69–216, 69–302, 69–303, 69–304, and 69–305

Filed 10/17/06 Effective 11/16/06

Agency Contact: Alison Garcia (916) 657–2586

DEPARTMENT OF SOCIAL SERVICES IHSS Plus Waiver Program

California received federal financial support for recipients of In-Home Supportive Services ("IHSS") that would have lost services because of budget cuts in the 2004–2005 budget year. The program was subsequently authorized for implementation by Welfare and Institutions Code section 14132.951 (added by Stats. 2004, ch. 229 (Senate Bill 1104)). This new program, "IHSS Plus Waiver," will be administered based on the same regulations as the standard IHSS program. These regulations amend MPP section 30-700 to implement the IHSS Plus Waiver program and adopt MPP section 30-785, which refers to the corresponding IHSS sections, governing eligibility, determination of eligibility, need, program content, time per task, application process, responsibilities, needs assessment standards, service authorizations, individual providers compensation, cost limitations, county plans, service delivery methods, overpayments and underpayments, payroll for individual providers and provider identification.

Title MPP

California Code of Regulations ADOPT: 30–785 AMEND: 30–700

Filed 10/12/06 Effective 10/12/06

Agency Contact: Alison Garcia (916) 657–2586

DIVISION OF WORKERS COMPENSATION

Workers' Compensation — Forms

The Division of Workers' Compensation is amending the captioned sections in order to provide the new address: P. O. Box 420603, San Francisco, CA 94142–0603.

Title 8

California Code of Regulations

AMEND: 9768.5, 9768.10, 9788.11, 9788.31,

9789.33

Filed 10/18/06

Effective 10/18/06

Agency Contact: Destie Overpeck (415) 703–4659

STATE WATER RESOURCES CONTROL BOARD

This action amends the Central Valley Water Board Basin Plan by adding a plan for the control of mercury in Cache Creek, Bear Creek, Sulphur Creek and Harley Gulch.

Title 23

California Code of Regulations

ADOPT: 3945.1 Filed 10/17/06 Effective 10/17/06

Agency Contact: Glenda Marsh (916) 341–5558

SUPERINTENDENT OF PUBLIC INSTRUCTION School Community Violence Prevention Grant Pro-

gram

Second readoption of emergency regulations that establish requirements for local education agencies, defined as county offices of education and local school boards, to apply for and receive grants for school violence prevention programs.

Title 5

California Code of Regulations

ADOPT: 11987, 11987.1, 11987.2, 11987.3,

11987.4, 11987.5, 11987.6, 11987.7

Filed 10/16/06

Effective 10/16/06

Agency Contact: Debra Strain (916) 319–0641

VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD

Transportation by Automobile

This regulatory action amends 2 CCR 714 to increase the mileage reimbursement rate for elected state offi-

AMEND: 18526

ADOPT: 18438.5 AMEND: 18438.8

06/08/06

05/26/06

cers, and officers and employees of the state provided for in Article VI of the California Constitution, while traveling on official state business. The base rate, which has not been increased since 1982, is currently 16.5 cents per mile. This action increases the rate to the federal standard mileage rate of 44.5 cents per mile. This is a print only action pursuant to Government Code 11340.9(g).

Title 2
California Code of Regulations
AMEND: 714
Filed 10/12/06
Effective 10/12/06
Agency Contact:
Karl Grossenbacher

(916) 327–0400

CCR CHANGES FILED WITH THE SECRETARY OF STATE WITHIN MAY 17, 2006 TO OCTOBER 18, 2006

All regulatory actions filed by OAL during this period are listed below by California Code of Regulations titles, then by date filed with the Secretary of State, with the Manual of Policies and Procedures changes adopted by the Department of Social Services listed last. For further information on a particular file, contact the person listed in the Summary of Regulatory Actions section of the Notice Register published on the first Friday more than nine days after the date filed.

Title 2

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10/12/06 AMEND: 714
09/27/06 AMEND: 18754
09/07/06 AMEND: 21904, 21905
09/05/06 AMEND: 1859.2, 1859.76, 1859.83,
         1859.163.1
08/23/06 AMEND: 1181.4
08/21/06
         AMEND: 1859.2, 1859.70.1, 1859.71.3,
         1859.78.5
08/15/06 ADOPT: 20108, 20108.1, 20108.12,
         20108.15,
                      20108.18,
                                    20108.20,
         20108.25,
                       20108.30,
                                    20108.35,
         20108.36,
                      20108.37,
                                    20108.38,
         20108.40,
                      20108.45,
                                    20108.50,
         20108.51.
                      20108.55,
                                    20108.60.
                      20108.70,
         20108.65,
                                    20108.75,
         20108.80
08/11/06
         AMEND: 1859.2, 1859.40, 1859.51,
         1859.70, 1859.93.1, 1859.95, 1859.147,
         1859.202, 1866
07/24/06
         AMEND: 18944
07/06/06 AMEND: 575.1, 575.2
06/20/06 AMEND: 18537
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05/25/06
          AMEND: 18942
 05/24/06 AMEND: 433.1
 05/24/06
          ADOPT: Div. 8, Ch. 111, Sec. 59560
 05/17/06
          ADOPT: 22610.1, 22610.2, 22610.3,
           22610.4
Title 3
 10/12/06
          AMEND: 3433(b)
 10/12/06
          AMEND:3424
 10/12/06
           AMEND:3433(b)
 10/06/06
          AMEND: 3591.13(a)
 10/06/06
          AMEND: 3700(c)
 10/05/06
          AMEND: 3589
 10/05/06
          AMEND: 3433(b)
 10/02/06
          AMEND: 3591.6(a)
 09/19/06
          AMEND: 3433(b)
 09/12/06
          AMEND: 3591.12(a)
 09/12/06
          AMEND: 3406(b)
 09/08/06
          AMEND: 3423(b)
 09/07/06
          AMEND: 3433(b)
 09/05/06 AMEND: 3406(b)
 08/29/06
          AMEND: 3433(b)
 08/24/06 AMEND: 3433(b)
 08/23/06 AMEND: 3591.12(a)
 08/17/06
          AMEND: 3591.19(a)
 08/16/06 AMEND: 3433(b)
 08/15/06
          AMEND: 3700(c)
 08/15/06
          AMEND: 3700(c)
 08/10/06 AMEND: 3591.6(a)
 08/01/06 AMEND: 3591.6(a)
 08/01/06
          AMEND: 3424(b)
 07/28/06
          AMEND: 3591.2(a)
 07/26/06
          AMEND: 3700(c)
 07/21/06
          REPEAL: 1366
 07/19/06
          ADOPT: 6310 AMEND: 6170
 07/18/06
          ADOPT: 6960 AMEND: 6000
 07/17/06
          AMEND: 3591.6(a)
 07/05/06
          AMEND: 3591.6
 07/03/06
          AMEND: 3589(a)
 06/28/06
          AMEND: 3433(b)
 06/12/06
          AMEND: 3433(b)
 05/23/06 ADOPT: 3424
 05/23/06
          ADOPT: 6580, 6582, 6584
 05/19/06
          AMEND: 3433(b)
 05/18/06
           AMEND: 3591.12(a)
 05/18/06
          ADOPT: 1472.7.2 AMEND: 1472,
           1472.4
Title 4
 10/16/06
          AMEND: 1733
 09/26/06
          AMEND: 1976.8
 07/19/06
          AMEND: 12358, 12359
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07/17/06

AMEND: 2240(e)

06/20/06 AMEND: 1472

06/01/06	AMEND: 8070(d), 8071(a)(9), 8072,	Title 9	
	8073(c), 8074(b), 8076(c)(1)	09/25/06	ADOPT: 3400
05/18/06	ADOPT: 12358	06/07/06	ADOPT: 10056, 10057
Title 5		05/24/06	ADOPT: 3400
10/16/06	ADOPT: 11987, 11987.1, 11987.2,	05/19/06	ADOPT: 1810.100, 1810.110, 1810.200,
	11987.3, 11987.4, 11987.5, 11987.6,		1810.201, 1810.202, 1810.203,
	11987.7		1810.203.5, 1810.204, 1810.205,
09/29/06	ADOPT: 19833.5, 19833.6 AMEND:		1810.205.1, 1810.205.2, 1810.206,
	19815, 19816, 19816.1, 19819, 19824,		1810.207, 1810.208, 1810.209,
09/15/06	19828.1, 19831 PEPEAL: 18074.1(b) (c) (d) 18074.2		1810.210, 1810.211, 1810.212,
09/13/06	REPEAL: 18074.1(b), (c), (d), 18074.3, 18074.4, 18074.5, 18074.6		1810.213, 1810.214, 1810.214.1,
08/30/06	ADOPT: 15566, 15567, 15568 REPEAL:		1810.215, 1810.216
08/30/00	15569	Title 10	
08/15/06	AMEND: 1030.7, 1030.8	10/16/06	ADOPT: 2194.9, 2194.10, 2194.11,
07/31/06	· · · · · · · · · · · · · · · · · · ·		2194.12, 2194.13, 2194.14, 2194.15,
07,01,00	1043.10, 1047, 1048 AMEND: 1040,		2194.16, 2194.17
	1041, 1043, 1044 REPEAL: 1042, 1045,	10/10/06	AMEND: 2498.4.9
	1046	10/03/06	AMEND: 2498.5
07/27/06	ADOPT: 40500.1, 40511, 40512, 41020	10/02/06	AMEND: 2248.4, 2249.1, 2249.2,
	AMEND 40100		2249.6, 2249.7, 2249.8, 2249.9, 2249.10,
07/25/06	ADOPT: 1207.1, 1207.2 AMEND:		2249.11, 2249.12, 2249.13, 2249.13,
0= (0.1 (0.5	1204.5		2249.14, 2249.15, REPEAL: 2248.11,
	ADOPT: 15566, 15567, 15568, 15569		2248.12, 2248.19
	ADOPT: 10922.5 10922.6 AMEND:	09/20/06	AMEND: 2318.6, 2353.1
06/12/06	ADOPT: 19833.5, 19833.6 AMEND: 19815, 19816, 19816.1, 19819, 19824,	09/14/06	AMEND: 3528
	19828.1, 19831	08/29/06	AMEND: 2699.6600
06/09/06	ADOPT: 19827 AMEND: 19812, 19813,	08/28/06	ADOPT: 803, 810, 810.1, 810.2, 810.3,
00/02/00	19814, 19814.1, 19815, 19816, 19817,		810.4, 810.5, 810.6, 810.7 AMEND: 800,
	19817.1, 19826, 19826.1, 19836, 19851,	00/00/05	801, 802, 804, 806, 807
	19853	08/08/06	ADOPT: 3583 AMEND: 3500, 3525,
05/25/06	AMEND: 1074		3527, 3528, 3541, 3542, 3543, 3544,
Title 8			3563, 3568, 3603, 3622, 3668, 3681,
10/18/06	AMEND: 9768.5, 9768.10, 9788.11,	09/02/06	3682, 3761 REPEAL: 3541
	9788.31,9789.33	08/02/06	ADOPT: 2790.7 ADOPT: 5370, 5371, 5372, 5373, 5374,
09/29/06	AMEND: 341, 341.1	06/01/00	5375, 5376, 5377
09/25/06	AMEND: 4920	07/28/06	AMEND: 2698.52(c), 2698.53(b),
09/21/06	ADOPT: 10001, 10002, 10003	07/28/00	2698.56(c) 2098.52(c), 2098.53(b),
09/19/06	ADOPT: 1532.2, 5206, 8359 AMEND:	07/26/06	ADOPT: 5280, 5281, 5282, 5283, 5284,
	5155	0.7/20/00	5285,5286
07/31/06	AMEND: 5154.1	07/24/06	ADOPT: 2498.6
07/28/06	AMEND: Subchapter 4, Appendix B,	07/18/06	AMEND: 2498.5, 2498.6
07/07/06	Plate B-1-a	07/14/06	AMEND: 2632.5, 2632.8, 2632.11
07/27/06	ADOPT: 3395 ADOPT: 10004, 10005 AMEND:	07/12/06	ADOPT: 2190.20, 2190.22, 2190.24
07/19/06	•	07/12/06	AMEND: 2697.6
07/18/06	10133.53, 10133.55 AMEND: 3270	07/12/06	
	AMEND: 9793, 9795	07/10/06	
06/26/06	ADOPT: 6858 AMEND: 6505, 6533,	06/30/06	ADOPT: 2194.9, 2194.10, 2194.11,
	6551, 6552, 6755, 6845, 6657 REPEAL:		2194.12, 2194.13, 2194.14, 2194.15,
	6846		2194.16, 2194.17
06/06/06	AMEND: 5155	06/19/06	AMEND: 2318.6, 2353.1, 2354
05/25/06	AMEND: 4650	06/05/06	AMEND: 3528

06/01/06	ADOPT: 2695.1(g), 2695.14 AMEND:	Title 14	
	2695.1, 2695.2, 2695.7, 2695.8, 2695.9,	10/11/06	AMEND: 895, 895.1, 1038, 1038(f)
05/05/06	2695.10, 2695.12	10/06/06	AMEND: 670.2
05/25/06	,	09/20/06	AMEND: 895.1, 898, 914.8, [934.8,
	AMEND: 2186.1, 2188.2, 2188.6, 2188.8		954.8], 916, [936, 956], 916.2 [936.2,
05/18/06			956.2], 916.9, [936.9, 956.9], 916.11,
Title 11	111111111111111111111111111111111111111		[936.11, 956.11], 916.12, [936.12,
10/13/06	AMEND: 30.5		956.12], 923.3, [943.3, 963.3], 923.9, [943.9, 963.9]
	AMEND: 30.1	09/19/06	
	ADOPT: 1084	09/15/06	AMEND: 851.8, 851.23, 851.51.1,
	AMEND: 1001, 1005, 1008, 1011, 1014,		851.85, 852.3, 851.4, 851.10, 851.10.1
	1015, 1018, 1052, 1053, 1055, 1056,	08/31/06	AMEND: 27.80
	1081 and Procedures D-1, D-2, D-10	08/11/06	AMEND: 7.50
0= 40.0	E-1, F-1, and F-6	08/11/06	AMEND: 1261
07/12/06		08/04/06	ADOPT: 701, 702 AMEND: 1.74, 27.15,
06/28/06	ADOPT: 4400(II), 4400(mm), 4401.1, 4406 AMEND: 4440.3 REPEAL:	07/21/06	27.67,478.1,551,601,708
	4400(1),4406	07/31/06	ADOPT: 4970.49, 4970.50, 4970.51, 4970.52, 4970.53, 4970.54, 4970.55,
06/28/06	· / /		4970.56, 4970.57, 4970.58, 4970.59,
0 0, -0, 0 0	4021, 4022, 4023, 4024, 4030, 4031,		4970.60, 4970.61, 4970.62, 4970.63,
	4032, 4034, 4035, 4036, 4037, 4038,		4970.64, 4970.65, 4970.66, 4970.67,
	4039, 4040, 4041, 4045, 4047, 4048,		4970.68, 4970.69, 4970.70, 4970.71,
	4049, 4050, 4051, 4052, 4053, 4054,		4970.72
	4055, 4056, 4057, 4058, 4059, 4060,	07/31/06	ADOPT: 4970, 4970.02, 4970.03,
05/23/06	4061, 4062, 4063, 4064, 4065, 4066 AMEND: 1002(c)		4970.04, 4970.05, 4970.06, 4970.07,
	AMEND: 968.44, 968.46		4970.08, 4970.09, 4970.10, 4970.11,
	REPEAL: 2033		4970.12, 4970.13, 4970.14, 4970.15, 4970.16, 4970.17, 4970.18, 4970.19,
Title 13			4970.10, 4970.17, 4970.18, 4970.19, 4970.20, 4970.21 AMEND: 4970.00,
	AMEND: 1956.8, 2404, 2424, 2425,		4970.01 REPEAL: 4970.02, 4970.03,
10/10/00	2485		4970.04
10/05/06	AMEND: Section 1	07/28/06	ADOPT: 7.50(b)(178)
09/14/06	AMEND: 25.06, 25.07, 25.08, 25.10,	07/28/06	AMEND: 15411
	25.14, 25.15, 25.16, 25.17, 25.18, 25.19,	07/19/06	ADOPT: 18459.1.2, Forms CIWMB 203,
	25.20, 25.21, 25.22		204 AMEND: 18449, 18450, 18451,
09/11/06	ADOPT: 2467.8, 2467.9 AMEND: 2467,		18453.2, 18456, 18456.2.1, 18459, 18459.1, 18459.2.1, 18459.3, 18460.1,
	2467.1, 2467.2, 2467.3, 2467.4, 2467.5.		18460.1.1, 18460.2, 18460.2.1, 18461,
	2467.6, 2467.7, Incorporated Documents REPEAL: 2467.8, Incorporated Test		18462, 18463, 18464, 18466, Penalty
	Method 512		Tables 1, 11
09/07/06	AMEND: 1956.1, 1956.8, 2023.1,	07/12/06	AMEND: 507.1
	2023.4	07/11/06	ADOPT: 1723(g) AMEND: 1722(j),
08/24/06	AMEND: 28.22		1722, 1722.1, 1722.1.1, 1723(a),
07/28/06	AMEND: 154.00		1723.1(c), 1723.1(d), 1723.5,
06/30/06	ADOPT: 85.00, 85.02, 85.04, 85.06,	07/11/06	1723.7(d)(2)(f), 1723.8
06/20/06	85.08	07/11/06	AMEND: 250 261 262 263 264
06/29/06 06/16/06	AMEND: 345.16 AMEND: 2023.4	06/30/06 06/30/06	AMEND: 360, 361, 362, 363, 364 AMEND: 11900
06/15/06	AMEND: 2025.4 AMEND: 1239	06/29/06	AMEND: 851.23
	AMEND: 425.01	06/23/06	AMEND: 1220
	ADOPT: 86500, 86501	06/16/06	AMEND: 895, 895.1, 1038, 1038(f)
05/18/06	ADOPT: 550.20 AMEND: 551.11,	06/08/06	AMEND: 746
	551.12	06/05/06	AMEND: 791.7, Form FG OSPR-1972

		,	
05/26/06	AMEND: 670.2	06/14/06	AMEND: 2537, 2537.1
05/23/06	AMEND: 401	06/05/06	ADOPT: 2608
05/17/06	AMEND: 182	06/05/06	AMEND: 3303
Title 14, 22		06/05/06	AMEND: 2630, 2630.1
07/27/06	ADOPT: 69200, 69201, 69202, 69203,	06/01/06	ADOPT: 137
	69204, 69205, 69206, 69207, 69208,	05/31/06	ADOPT: 869.9 AMEND: 868, 869
	69209, 69210, 69211, 69212, 69213,	05/30/06	AMEND: 3340.1, 3340.16, 3340.16.5,
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06/26/06	AMEND: 30–757, 30–761

OAL REGULATORY DETERMINATIONS

OFFICE OF ADMINISTRATIVE LAW

2006 OAL Determination No. 1

Petitioner: CHARLES CIANCIO

Concerning: DEPARTMENT OF FORESTRY

AND FIRE PROTECTION:

BUFFER ZONE FOR OSPREY

NESTS

CTU-06-0417-01

Determination issued pursuant to Government Code section 11340.5.

ISSUE

On April 17, 2006, Mr. Charles Ciancio submitted a petition to the Office of Administrative Law (OAL), alleging that the California Department of Forestry and Fire Protection (CDF) employs an underground regulation in violation of Government Code section 11340.5. The petition alleges that CDF requires a 1,320 foot radius buffer zone around osprey nests in Timber Har-

vesting Plans (THPs) in violation of applicable California statutes and regulations.

CONCLUSION

The facts presented by and discovered in connection with this petition appear to demonstrate the use of an underground regulation, either by the Department of Fish and Game (DFG) or by CDF. The record before OAL, however, is limited. Necessary facts cannot be demonstrated with certainty and OAL has no fact finding authority which would allow us to prove these matters one way or another. Due to these factual limitations, we cannot say conclusively that the CDF, the agency against which this petition was filed, has employed an underground regulation in violation of section 11340.5 of the Government Code.

FACTUAL BACKGROUND 1

This petition involves the approval of THPs by CDF. Approval of the timber harvesting plan is required before private owners of forested property may harvest trees from the property. The process of developing and obtaining approval of a THP is complicated. It is described as follows on the CDF web site²:

The California Department of Forestry and Fire Protection (CDF) enforces the laws that regulate logging on privately-owned lands in California. These laws are found in the Forest Practice Act [³] . . . which was enacted in 1973 to ensure that logging is done in a manner that will preserve and protect our fish, wildlife, forests and streams. Additional rules enacted by the State Board of Forestry and Fire Protection are also enforced to protect these resources. CDF ensures that private landowners abide by [California's timber harvesting] laws when harvesting trees. Although there are specific exemptions in some cases, compliance with the Forest Practice Act and Board rules apply to all commercial harvesting operations for landowners of small parcels, to ranchers owning hundreds of acres, and large timber companies with thousands of acres.

The Timber Harvesting Plan (THP) is the environmental review documents submitted by landowners to CDF outlining what timber he or she wants to harvest, how it will be harvested, and

¹ CDF chose not to file a formal response to this petition pursuant to title 1, Cal. Code of Regs. §270(f). This factual background summary is based upon the petition, information from prior correspondence OAL has had on this issue, and publicly available information.

² http://www.fire.ca.gov/php/rsrc-mgt_forestpractice.php

³ The web site provides a link to a document that provides an apparently comprehensive compilation of relevant California regulations and statutes.

the steps that will be taken to prevent damage to the environment. THPs are prepared by Registered Professional Foresters (RPFs) who are licensed to prepare these comprehensive, detailed plans. THPs can range from about 100 pages to more than 500 pages.

CDF does not have the authority to deny a THP that is in compliance with state and federal rules and laws, simply because the logging plan is unpopular with the public. The Department reviews and approves between 500 to 1,400 THPs each year. A THP that does not comply with all forestry and environmental regulations is returned to the RPF. It is only approved after the RPF and landowner agree to make the changes necessary to ensure compliance with all laws. CDF follows—up on approved THPs with site inspections and can shutdown operations, cite or fine Registered Professional Foresters, Licensed Timber Operators (LTOs), and landowners if illegal operations are found.

The THP is the environmental review document prepared by an RPF for the landowner. The THP includes the timber the landowner wishes to harvest, the method of harvesting and the steps taken to prevent damage to the environment. The requirements for developing the THP are found in the Z'Berg–Nejedly Forest Practice Act of 1973⁴.

A property owner who wants to harvest timber must employ a Registered Professional Forester (RPF) to help develop the THP. The THP must comply with all forestry and environmental regulations before CDF will accept it for consideration. Once CDF accepts the THP for consideration, it makes it available for public review and provides it to a variety of other state agencies for their review and feedback ⁵.

During the agency and public review period the proposed THP is subject to amendment. The THP, as developed by the RPF, is submitted to the CDF as the lead agency in the review of the Plan. The review consists of a multidisciplinary review team of specialists from other governmental agencies to ensure compliance with environmental laws and regulations. During this review period, the members of the review team may suggest

additional recommendations. It is during this review period that the DFG consistently asks that the plans be amended to expand osprey buffer zones from the maximum radius allowed in CDF's regulations to a radius of one–quarter of a mile — 1,320 feet — around the nests⁶. A 1,320 foot radius buffer zone is significantly larger than required by applicable California law. A petitioner who agrees to include a one–quarter mile radius buffer zone in the THP avoids having the DFG contest this point further in the THP approval process.

Public Resources Code section 4581 provides:

No person shall conduct timber operations unless a timber harvesting plan prepared by a registered professional forester has been submitted for such operations to the department pursuant to this article.

The CDF has adopted regulations establishing the buffer zone for the osprey in subchapters 4, 5, and 6 of Title 14 of the California Code of Regulations (CCR). Subchapter 4 covers the Coast Forest District, subchapter 5 covers the Northern Forest District, and subchapter 6 covers Southern Forest District. The language is identical for each district (title 14, CCR, §§ 919.3, 939.3, and 959.3):

The following requirements shall apply to nest sites containing active nests and not to nest sites containing only abandoned nests.

- (a) Buffer zones shall be established around all nest trees containing active nests. The buffer zones shall be designed to best protect the nest site and nesting birds from the effects of timber operations. In consultation with the Department of Fish and Game, and as approved by the Director, an RPF or supervised designee shall flag the location of the boundaries of the buffer zone, and the configuration of the buffer zone. Consultation with the Department of Fish and Game shall be required pursuant to 14 CCR 898. Consideration shall be given to the specific habitat requirements of the bird species involved when configuration and boundaries of the buffer zone are established.
- (b) The size of the buffer zone for each species shall be as follows:

• • •

(5) For the Osprey, the buffer zone may be up to five acres in size. When explained and justified in writing, the Director may increase the size of the

⁴ California Public Resources Code, division 4, chapter 8, and the California Forest Practice Rules adopted by the CDF in title 14 Cal. Code Regs §§ 895 – 1115.3.

⁵ Pursuant to title 14, Cal. Code Regs § 1037.3, the THP is provided to "the Department of Fish and Game, the appropriate California Regional Water Quality Control Board, the Department of Conservation, Division of Mines and Geology, the Department of Parks and Recreation, the county planning agency and, if the areas are within their jurisdiction, to the California Tahoe Regional Planning Agency and the California Coastal Commission."

⁶ The CDF regulations provide for a buffer zone of five acres with an option to increase the zone to 18 acres. According to the math used by the petitioner, five acres would be a roughly 263.5 foot radius around the nest, and 18 acres would be a 763.2 foot radius. The THPs recommended by DFG, and approved by CDF include a 1,320 foot radius — 125.6 acres.

buffer zone to a maximum of 18 acres when necessary to protect nesting birds.

According to the information provided in the petition, the recommendations by DFG are routinely added to the THP. The RPF and the landowner agree to the recommendations before it is submitted to CDF. In January of 2006, Mr. Ciancio requested an explanation of the larger buffer zone from CDF. In a response dated January 17, 2006, William Snyder, Deputy Director, Resource Management for CDF states:

In all three examples provided and in recognition of the time and cost associated with a plan denial or withdrawal, CDF elected to work with the plan submitters, DFG and the RPF. As required under 14 §1037.5(f), the plan submitters agreed to incorporate the specific additional mitigation measures into the plan established for the protection of Osprey through consultations with DFG. As provided by the FPRs under 14 CCR § 919 and 898.1(b), CDF relied on the expertise of DFG in establishing these mitigation measures during the review of each plan.

The record before OAL includes several examples of THPs which incorporate the one–quarter mile osprey nest buffer. The record does not include an explicit rule or policy statement by CDF, DFG, or any other state agency which purports to require all THPs to contain such a buffer zone.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the Administrative Procedure Act (APA). It states as follows:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency employs a rule in violation of section 11340.5 it is employing an underground regulation. "Underground regulation" is defined in title 1, CCR, § 250 as follows:

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section

11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

To determine that an agency employs an underground regulation in violation of Government Code section 11340.5, it must be demonstrated that the agency employs a regulation, that the regulation has not been adopted pursuant to the APA, and that the rule is not subject to an express statutory exemption from the APA.

OAL is empowered to issue its determination as to whether or not an agency employs an underground regulation pursuant to Government Code section 11340.5, subdivision (b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue.

ANALYSIS

To conclude that a state agency is employing an underground regulation, OAL must determine that the agency is employing a rule that is applicable generally. This is most easily done when the agency has a written policy statement or other directive that, on its face, constitutes a rule of general application. In this case we do not have such a written rule. The record before OAL does not include any documents from CDF, DFG, or any other state agency establishing an explicit rule of general application that requires all THPs to have a 1,320 foot radius buffer zone around an osprey nest. On the other hand, CDF, subject agency of this petition and the agency which has the final approval authority for THPs, has not identified any approved THP with an osprey nest buffer zone of less than 1,320 feet. The record before OAL includes several examples of THPs containing the 1,320 foot buffer zone. The record includes no evidence that a THP has ever been approved with less than a 1,320 foot buffer zone around each osprey nest. This record is certainly most consistent with the existence of a rule of general application, but it does not establish the existence of such a rule to a legal certainty.

Although the record before OAL does not include any writing that appears to create a rule of general application, either as an instruction to state employees to require a 1,320 foot buffer zone in all cases, or as a purported rule establishing a standard that property owners must satisfy when seeking approval of a THP, the lack of a written rule does not mean that no underground regulation is being employed. Government Code section

⁷ Grier v. Kizer 219 Cal.App.3d 422, 268 Cal.Rptr. 244; 1990

11340.5 provides that a state agency shall not "utilize, enforce, or attempt to enforce any . . . standard of general application". An underground regulation does not need to be a written rule.⁸

OAL does not have legal power to compel production of documents or testimony. If this issue were litigated, those challenging the one-quarter mile buffer zones would be able to engage in discovery proceedings through which the facts underlying the imposition of an apparently uniform requirement could be established. This could show definitively whether or not CDF or DFG are employing a rule of general application. The facts available to OAL are most consistent with the conclusion that there is a rule of general application producing these uniform results. The facts are not, however, conclusive. Other facts not in the record before us could demonstrate that no standard of general application is being applied. Since OAL cannot serve as a finder of fact, we cannot develop the record that would allow us to find conclusively whether or not such contrary facts

Although not conclusive to a legal certainty, in this case the available facts are most consistent with the conclusion that a property owner cannot expect to obtain approval of a THP without agreeing to a quarter—mile buffer zone around each osprey nest. This fact is most consistent with the conclusion that a state agency involved in the THP approval process is employing an underground regulation to require a 1,320 foot buffer around every osprey nest. The limited record before us is most consistent with the existence of an underground regulation.

Assuming, for the sake of further analysis, that the one–quarter mile buffer zone around osprey nests is in fact the result of an underground regulation, the question remains of what agency is employing the underground regulation. This question is complicated by the numerous entities involved in the THP approval process.

Although CDF has adopted regulations specifying the size of the buffer zone, there does not appear to be any law which prevents a landowner from voluntarily agreeing to the larger buffer zone recommended by DFG. If acceptance of a 1,320 foot buffer zone by each property owner is truly voluntary and in each instance this results from a case—by—case analysis specific to each THP, then there would be no underground regula-

tion. If, however, acceptance of the one quarter mile buffer zone is somehow coerced, the issue arises of whether this is being enforced by CDF or by DFG.

Evidence in the file indicates that the acceptance of a 1,320 foot buffer area for osprey nests by property owners is not entirely voluntary. The CDF has adopted regulations specifying the extent of buffer zones around osprey nests. It is during the review process that the larger buffer zone is added to the THP at the recommendation of DFG and the agreement of the RPF and landowner. The documents submitted establish that CDF interprets the revised THP to be the result of a voluntary agreement between DFG, the RPF and the landowner.

To conclude that an underground regulation is being employed, therefore, OAL must conclude that, in fact, the uniform acceptance of a one–quarter mile buffer zone by THP applicants is not truly voluntary. In reviewing the documents submitted by the petitioner in a previous request for determination with respect to actions by DFG, ⁹ we found a letter from Dick Dickerson, Assemblyman from the Second District and a former Vice–Chairman of the Natural Resources Committee and the Water Parks and Wildlife Committee. In the letter dated November 20, 2002, Mr. Dickerson says:

We have talked to the State Fish and Game officers involved in this petition and while their intentions are honorable they seem to have gone way outside the parameters set in law for the protection of the species.

I hope you will agree that if stricter protective measures may have been voluntarily agreed to and used by other landowners, it should not necessarily raise the official bar above the law for other landowners.

Again, the record is not adequate to allow OAL to evaluate definitively whether the agreement to the DFG recommendations is truly voluntary, or whether the property holders accept buffer areas much larger than are required by regulation out of fear that opposing the buffer area recommended by DFG will result in costly and time—consuming appeals and litigation. This is another fact—dependent matter which cannot be effectively examined by OAL, which is not a court and lacks the tools to compel cooperation, such as the power of subpoena, which are available to a court.

The question of whether or not the acceptance of a 1,320 foot radius buffer zone is truly voluntary affects the question of which state agency may be employing an underground regulation here. The apparent CDF

⁸ The most recent case by the California Supreme Court dealing with underground regulations, *Morning Star Company v. State Board of Equalization* (2006) 38 Cal.4th 324, 42 Cal.Rptr.3d 47 found that the Department of Toxic Substances Control had employed an underground regulation solely in the manner in which it implemented a statute. No written rule was involved but the Court had no difficulty in inferring the existence of a rule of general application based upon the agency's actions.

⁹ This request for determination alleged that the larger buffer zone was imposed by DFG and was an underground regulation. At the time that petition was submitted OAL had suspended issuance of determinations due to staff reductions. OAL did not accept the request and a determination was not made on the issue.

position is that the THP reflects a mutually agreed upon course of action. This position, if correct, implies that CDF does not issue, use, enforce or attempt to enforce an underground regulation. It merely approves the THP that reflects both the recommendations of the review committee and the acceptance of those recommendations by the landowner and RPF. Under this interpretation, CDF does not implement any rules. Rather, it simply ratifies a voluntary agreement. If, however, CDF is aware of facts indicating that DFG imposes a rule requiring a 1,320 foot buffer area, and is aware of facts indicating that this buffer area is imposed upon property owners involuntarily, then CDF's review and approval of these THPs could place CDF in the position of enforcing DFG's underground regulation. Such facts would place both DFG and CDF in violation of section 11340.5 of the Government Code. Again the file before OAL does not contain facts sufficient for OAL to reach this conclusion to a legal certainty.

Other facts indicate some degree of difference between the way that CDF approaches the issue of establishing osprey buffer zones and the way that DFG approaches the issue. In 2003, petitioner requested a determination also challenging the size of the osprey buffer zone. Larry Week, Chief of the Native Anadromous Fish and Watershed Branch at DFG says in a letter concerning the request, dated March 12, 2003, and addressed to Regional Managers at CDF:

The Department [DFG] would like to clarify that no standard or rule of general application should be used to determine appropriate buffer zones for osprey nests. Instead, protective measures should be based on site-specific project condition, pertinent scientific information, and biological discretion. The Native Anadromous Fish and Watershed Branch (NAFWB) in cooperation with the Regions and Habitat Conservation Planning Branch is in the process of composing guidance that will suggest biological criteria that should be employed when making project specific mitigation measures and recommendations to CDF. Until that guidance is issued, please continue to individually evaluate each osprey nest within the boundaries of a THP, and make any necessary recommendations regarding buffer zones based on the biological factors of each THP and nest site.

It is clear that CDF and DFG have differing concepts of the role of regulation in the THP process. CDF has duly adopted regulations — standards and rules of general application for setting the size of buffer zones. DFG

does not appear to feel that it must obey these regulations and, instead, indicates that it makes a decision based on a case—by—case evaluation. It is curious that each such case—by—case evaluation results in a buffer zone of exactly 1,320 foot radius around each osprey nest. As with other issues, this does not determine which of these two agencies, if either, is employing an underground regulation. It does, however, demonstrate the complications of this issue.

CONCLUSION

The facts presented in this petition demonstrate a high probability that either the CDF or the DFG or both of them are employing an underground regulation in requiring every THP to provide a 1,320 foot radius buffer zone around every osprey nest. However, since there is no written expression of this standard, the existence of the underground regulation can only be inferred though analysis of the facts. Since OAL has no authority to compel testimony or the production of documents, our ability to state a definitive legal conclusion is limited in a fact—dependant situation.

In particular, the fact that the alleged underground regulation is enforced through a series of negotiations on individual THP applications which allegedly result in voluntary agreements by applicants, makes it impossible for OAL to reach a definitive legal conclusion. If acceptance is truly voluntary, there may be no underground regulation being employed by a state agency. If acceptance is in some way required or coerced by a state agency, that agency would appear to be enforcing an underground regulation. Although it is easy to form opinions about what is probably involved in these negotiations, opinions alone cannot form the basis of a legal conclusion. OAL cannot conclude with legal certainty, based upon the record before us, that the acceptance of the quarter mile buffer zones is involuntary. A court would be able to engage in fact finding to prove or disprove this conclusion; OAL cannot.

Furthermore, because the process which creates the one–quarter mile buffer zone in each THP in the file before us involves both CDF and DFG, OAL cannot say with certainty that any underground regulation involved here is being enforced by CDF, the agency which is the object of the petition. Again, a court could develop a factual record on these issues; OAL cannot.

/s/

William L. Gausewitz Director

/s/

Kathleen Eddy Senior Counsel

 $^{^{10}}$ Another previous request for determination was similar to this petition in that it alleged CDF was using an underground regulation to impose a larger buffer zone. OAL was unable to accept the request and a determination was not made on the issue.